Office-Supreme Court, U.S.
FILED
SEP 7 1966
JOHN F. DAVIS, CLERK

LIBRARY
SUPREME COURT, U.S.

In the

SUPREME COURT OF THE UNITED STATES

No. 529

EARL WELCH,
Petitioner,

VERSUS

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

V. P. CROWE
PAUL R. McDANIEL
570 First National Building
Oklahoma City, Oklahoma
TOM FINNEY
Idabel, Oklahoma
Counsel for Petitioner

September, 1966

UTTERBACK TYPESETTING CO., 13 SO. WALKER, OKLAHOMA CITY, PH. CE 5-0030

TABLE OF CONTENTS

	PAGE
Citations to Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provisions Involved	4
Statement of the Case	4
Statement of Facts	5
Reasons for Granting the Writ	13
I. The Denial of Petitioner's Own Grand Jury Testimony	13
II. The Prejudicial Publicity	19
A. The Pre-trial Publicity	19
B. The Trial Publicity	22
III. The Inadmissible Evidence	30
IV. The Combination of Errors	35
Conclusion	37

TABLE OF AUTHORITIES CITED

CASES:

Blumberg v. United States, 222 F.2d 496 (5th Cir. 1955)	33
Boyd v. United States, 142 U.S. 450 (1892)	33
Briggs v. United States, 221 F.2d 636 (6th Cir. 1955)	22

INDEX CONTINUED

PAGE

Coppedge v. United States, 272 F.2d 504 (D.C. Cir. 1959), cert. denied 368 U.S. 855 (1961) ____ 22

Dennis v. United States, 34 U.S.L.Week 4556 (U.S. June 20, 1966) ____ 2, 13, 14, 15, 17, 18

Estes v. Texas, 381 U.S. 532 (1965) ____ 20, 27, 28, 29

Garner v. Louisiana, 368 U.S. 157 (1961) ____ 33

Hensley v. United States, 246 F.2d 190 (5th Cir. 1957), cert. denied 359 U.S. 984 (1959) ____ 22

Holland v. United States, 348 U.S. 121 (1954) ____ 16

Irvin v. Dowd, 366 U.S. 717 (1961) ____ 20

Janko v. United States, 366 U.S. 716 (1961) ____ 20

Marshall v. United States, 360 U.S. 313 ____ 28, 29

Murchison, In re, 349 U.S. 133 (1955) ____ 37

People v. Becker, 215 N.Y. 126, 109 N.E. 127 (1915) ____ 22

People v. Donaldson, 8 Ill.2d 510, 134 N.E.2d 776 (1956) ____ 33

Phillips v. State, 85 Okla. Cr. 81, 185 P.2d 239 (1947) ____ 33

Pittsburg Plate Glass Co. v. United States, 360 U.S. 395 (1959) ____ 14

Rideau v. Louisiana, 373 U.S. 723 (1963) ____ 20, 27, 28

Shepherd v. Florida, 341 U.S. 50 (1951) ____ 22

Sheppard v. Maxwell, 34 U.S.L.Week 4451 (U.S. June 6, 1966) ____ 20, 24, 26, 27, 28, 29

Stroble v. California, 343 U.S. 181 (1952) ____ 22

Stunz v. United States, 27 F.2d 575 (8th Cir. 1928) ____ 22

Thompson v. City of Louisville, 362 U.S. 199 (1960) ____ 33

Turner v. Louisiana, 379 U.S. 466 (1965) ____ 20, 27

United States v. Klein, 131 F.Supp. 807 (S.D. N.Y. 1955) ____ 34

INDEX CONTINUED

PAGE

United States v. Ogden, 105 Fed. 371 (3rd Cir. 1900) ____ 22
United States v. Powell, 171 F.Supp. 202 (N.D.Cal., S.D. 1959) ____ 23
Washington v. United States, 357 U.S. 348 (1958) ____ 33

CONSTITUTIONAL PROVISIONS:

Constitution of the United States:
Amendment V ____ 4
Amendment VI ____ 4

STATUTES:

26 U.S.C. § 7201 ____ 5
28 U.S.C. § 1254(1) ____ 2

RULES:

Supreme Court Rules, Rule 22(2) ____ 2
Federal Rules of Criminal Procedure, Rule 16 ____ 2, 15, 18

MISCELLANEOUS:

Brennan, The Criminal Prosecution: Sporting Event or Quest for Truth?, 1963 Wash.U.L.Q. 279 ____ 18
Calkins, Grand Jury Secrecy, 63 Mich.L.Rev. 455 (1965) ____ 17, 18
Sherry, Grand Jury Minutes, The Unreasonable Rule of Secrecy, 48 Va.L.Rev. 668 (1962) ____ 18

In the
Supreme Court of the United States
OCTOBER TERM, 1966

No. .....

EARL WELCH,
Petitioner,

VERSUS

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Earl Welch, petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above entitled case on June 22, 1966, as amended on August 9, 1966.

Citations to Opinions Below

The opinion of the Court of Appeals for the Tenth Circuit is unreported as yet, and is reproduced in the appendix to this petition at page Rs 1. The order of the Court of Appeals for the Tenth Circuit denying rehearing is

unreported as yet, and is reproduced in the appendix at page Rs 14.[1]

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on June 22, 1966. Rs 1. Rehearing was denied on August 9, 1966. Rs 14. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Rule 22(2) of this Court.

Questions Presented

1. Did the trial court err in denying petitioner's motions for production to the defense of petitioner's own grand jury testimony?

2. Does the holding of the Court of Appeals that a defendant is not entitled to his own grand jury testimony and may not seek relief on appeal from refusal of his grand jury testimony where he does not take the witness stand to testify, and establishing a "clear exception" to *Dennis* v. *United States* under such circumstances, deny effective review on appeal, frustrate the newly enacted amendments to Rule 16 of the Federal Rules of Criminal Procedure and the policy enunciated in *Dennis* v. *United States*?

3. Did the pre-trial and trial publicity in petitioner's case to which the jury was exposed deny petitioner's constitutional right to a fair and impartial trial?

---

[1] For convenience of reference, page numbers in the appendix to the petition will be preceded with "Rs"; page numbers in the record certified by the Court of Appeals will be preceded by "Ra." Nine copies of the three-volume printed record have been transmitted to this Court for examination in connection with this petition.

4. Did the trial judge fail adequately to protect the jury, once impaneled, from prejudicial extrinsic influence of publicity of alleged bribery attendant to the trial?

5. Did the trial judge err in denying petitioner's motion to hear testimony concerning bribery of another member of the Oklahoma Supreme Court in chambers and out of the presence of the jury and representatives of the various news media?

6. Did the actions of government attorneys (1) in linking petitioner's case to that of a former Oklahoma Supreme Court Justice who admittedly took a bribe, (2) in the timing of their indictments, (3) in making public statements in a separate case damaging petitioner, and (4) in causing damaging publicity during petitioner's trial by offering inadmissible evidence of bribery and calling a witness known to be claiming the Fifth Amendment, deny petitioner's constitutional right to a fair trial and deny him due process of law?

7. Did the trial court's action in admitting evidence of petitioner's relationship with his present wife of seven years while still married to his former wife, which was never connected to the crime with which petitioner was charged, constitute a denial of due process of law and a denial of petitioner's right to a fair trial?

8. Did a combination of individual errors in the aggregate show that the trial of petitioner failed to satisfy the requirements of due process of law?

Constitutional Provisions Involved

Constitution of the United States

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war, or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusations; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Statement of the Case

Petitioner, Earl Welch, for 32 years a justice of the Supreme Court of the State of Oklahoma, was charged by a grand jury indictment filed April 8, 1964, with willfully

and knowingly attempting to evade income taxes for the years 1957 through 1961, in violation of 26 U.S.C. § 7201. Ra 1. Trial commenced on October 5, 1964, in the United States District Court for the Eastern District of Oklahoma, Muskogee, Oklahoma. Ra 4. The jury returned a verdict of guilty on all five counts of the indictment. Ra 25.

Petitioner's Motion for Judgment of Acquittal, or in the alternative, Motion for New Trial,[2] was overruled by the trial court. Ra 40. The trial court entered judgment pursuant to the jury verdict, sentencing petitioner to imprisonment for a period of three years on each of the five counts, all sentences to run concurrently, and imposing fines for each of the counts totaling $13,500.00. Ra 40-41.

On June 22, 1966, the Court of Appeals for the Tenth Circuit entered an order affirming the judgment of the district court. On July 1, 1966, a petition for rehearing and rehearing *en banc* were filed; both were denied on August 9, 1966, the Court of Appeals, however, amending its original opinion by substitution of new pages 14, 18, 19 and 20 (Rs 10, 12, 13) to reflect its consideration of the issues raised by the petition for rehearing. On August 12, 1966, petitioner's Motion to Stay the Mandate Pending Application for Certiorari was granted.

Statement of Facts

On Tuesday, April 7, 1964, and Wednesday, April 8, 1964, petitioner, Earl Welch, appeared before the grand jury sitting in Oklahoma City, Oklahoma, the second day

---

[2] Ra 26. Hereinafter referred to as "Motion for New Trial."

at the request of government attorneys. At that time he was over 72 years old, and had suffered from diabetes for the past five years, which condition under doctor's orders required continuous medication and regular rest at noon or early afternoon each day. During both days of questioning petitioner was deprived of his required rest and was disturbed, distraught, exhausted and nervous. The questioning of the government's attorneys at the grand jury inquiry, at which, of course, petitioner was not represented by counsel, covered detailed and complex financial transactions of petitioner for a period of over 50 years, extending as far back as 1909. Ra 8-9.

Subsequently petitioner was unable to remember the details of his grand jury testimony. He could not provide his attorneys with information about the questions asked by government attorneys during their interrogation, nor the answers given by him. Thus, prior to trial, petitioner's attorneys filed a motion for the production of petitioner's testimony before the grand jury. Ra 4. This motion was denied by the trial court. Ra 10. Again, at the trial of the case, at the conclusion of the government's case in chief, the request was renewed for a copy of the transcript of the petitioner's testimony before the grand jury in order to refresh his recollection for possible testimony by him. The motion was denied by the trial court. Ra 82.

To the same grand jury that indicted petitioner, the government also presented its case against N. S. Corn, a former justice of the Supreme Court of Oklahoma. This was done despite the fact that the investigation of Justice Corn's case had been completed by December, 1962, at which time the Internal Revenue Service had forwarded

to the Department of Justice its entire file in Justice Corn's case with the recommendation that criminal prosecution be instituted against him. The Internal Revenue Service had been advised by Justice Corn that he would plead *nolo contendere* to any criminal charges made against him. Ra 31. The grand jury also indicted Justice Corn for willfully and knowingly attempting to evade federal income taxes.

At the time of his indictment, petitioner, in addition to his 32 years of service on the Oklahoma Supreme Court, had previously served as a district judge for six years and a practicing attorney for 15 years. No prior charge of misconduct had ever been made against petitioner during these 53 years of public and private life. Needless to say, the indictment of petitioner, coupled with that of Justice Corn, produced widespread and sensational headlines in the Oklahoma metropolitan newspapers. Rs 17, 19. Each of the newspaper accounts, of course, linked petitioner's case with that of Justice Corn. From April 9, 1964, through the trial petitioner's case was never mentioned in any newspaper account without mention being made of Justice Corn's case also.[3]

Petitioner's case was transferred for trial from Oklahoma City to the United States District Court for the Eastern District of Oklahoma, Muskogee, Oklahoma. Ra 4.

---

[3] See representative newspaper accounts attached as exhibits to petitioner's Motion for New Trial, Motion to Quash Jury Panel, or for Continuance (hereafter "Motion for Continuance") and Motion to hear testimony of certain witnesses in chambers and out of the presence of the jury. These exhibits have been certified to this Court by the Court of Appeals.

On July 1, 1964, Justice N. S. Corn was sentenced, on a plea of *nolo contendere,* to 18 months in prison, plus a fine. At the hearing, United States Attorney B. Andrew Potter read a prepared statement in which he charged that the government had evidence by a "witness" that $150,000 in $100 bills was paid to Justice Corn after the Oklahoma Supreme Court had reversed a lower court decision in a case in which the "witness" was interested in 1957. The United States Attorney further stated that Corn had "indicated" to the "witness" that the $150,000 would go to help himself and "other members of the Supreme Court in meeting campaign expenses." Rs 4.

Sensational headlines heralded the gratuitous disclosure by the United States Attorney:

> CORN GETS 18 MONTHS;
> COURT PAY-OFF CHARGED
>
> COURT BRIBE CHARGED;
> CORN GETS 18 MONTHS
> Justice Also Fined $11,000;
> "Others" Cited
>
> Rs 21, 23.

Petitioner's case was mentioned in all the articles relating to the allegations of bribery of "others" on the Oklahoma Supreme Court made by the United States Attorney.

Petitioner's trial commenced in Muskogee, Oklahoma, on October 5, 1964. Throughout the trial, extensive reports of the proceedings were carried by the Tulsa Tribune and the Tulsa World, the Oklahoma City Daily Oklahoman, and the Oklahoma City Times, the Muskogee Phoenix and the Muskogee Times-Democrat, all papers distributed in the area

of the trial. On October 4, the day before trial, lengthy stories appeared in the Sunday edition of these papers recounting the history of petitioner's case, linking him to the case of Justice Corn and the statement by the United States Attorney regarding bribery of the Oklahoma Supreme Court, and speculating on the appearance of the mystery "witness," reputedly one Hugh Carroll, at petitioner's trial. Petitioner filed a Motion for Continuance, but this was overruled by the trial court. Ra 11, 21.

Prior to the commencement of the hearing of testimony, petitioner also filed with the trial court a motion to hear the testimony of the witnesses, N. S. Corn and Hugh A. Carroll (whom petitioner presumed to be the "witness" referred to by the United States Attorney), in chambers and out of the hearing of the jury and of the representatives of the various news media covering the trial. Ra 19. Petitioner alleged that because of the extensive coverage that would be given to the trial by newspaper, radio and television, it would be impossible to prevent the jury from being exposed to publicity concerning the testimony of Corn and Carroll, if taken in open court, even if the testimony were taken out of the hearing of the jury. At this time the government attorneys had been advised that N. S. Corn would, if called to testify, invoke the Fifth Amendment. Ra 29, 37, 84. It was petitioner's position that if the witness Carroll could not connect petitioner in any way with any of his alleged payoffs to Justice Corn, no part of his testimony, nor the fact that Corn invoked the Fifth Amendment, should reach the jury directly or indirectly through newspaper accounts. The government agreed to take the testimony of the two witnesses out of the hear-

ing of the jury, but insisted that their testimony be taken in open court. Ra 47. The trial court overruled petitioner's motion. Ra 22.

The jury was not impounded during the trial which lasted over two weeks. Cautionary instructions were given to the jury by the trial judge at each noon and afternoon recess that the jurors were not to read any newspaper accounts of the trial nor listen to any radio or television broadcast accounts of it. Ra 47-48, 89, 154-155. The trial judge stated that he did not like to impound juries. Ra 154.

The trial of the case received widespread, sensational, page-one coverage in all of the major metropolitan newspapers covering the trial. On Friday, October 9, 1964, the government called N. S. Corn as a witness. The testimony of Justice Corn was taken outside the presence of the jury, but in open court. Justice Corn invoked the Fifth Amendment and declined to answer any questions propounded to him by the government on the ground that they might tend to incriminate him. Ra 68. Justice Corn's appearance, coming as it did at the close of the first week of trial, received extensive publicity over the week-end in the Muskogee, Tulsa, and Oklahoma City papers. See Rs 31-39. The jurors were released to go to their respective homes over the week-end and were thus exposed to this sensational revelation. Considerable speculation was also indulged in the newspaper accounts about the possible appearance at the trial of the "witness" Hugh Carroll as a government witness against petitioner.

On Monday, October 12, 1964, the government called the witness Hugh A. Carroll to the stand. The testimony of the witness was taken in open court, but out of the hearing

of the jury. Carroll testified that in the case of *Selected Investments Corporation* v. *Oklahoma Tax Commission* pending before the Oklahoma Supreme Court in 1956 and 1957, he had paid $150,000 to Justice Corn to arrange a favorable decision in the case. He testified that Justice Corn told him that he would "probably have to take care of some of the other boys in the matter," and that it would be used for the other boys "in the campaign expenses." The witness never had any conversation or dealings with Judge Welch at any time. Ra 71-73. The trial court sustained petitioner's objection to the testimony of the witness and ruled that it would not be permitted to go to the jury. Ra 73.

However, the afternoon newspapers on Monday, October 12, and Tuesday morning, October 13, sensationally displayed the testimony of the witness Carroll. The fact that Justice Corn had taken the Fifth Amendment and Carroll's testimony concerning the bribe paid to Justice Corn continued to be played up by the newspapers throughout the remainder of the trial.

At the inception of the trial, only one out of the 28 prospective jurors examined on *voir dire* had not read about the case in the newspapers or heard about it on radio or television. Ra 86, 89. However, all testified that they had formed no opinion about the case or about the guilt or innocence of petitioner. Ra 86, 90-154.

The jurors revealed on *voir dire* examination that the Muskogee, Oklahoma City, and Tulsa newspapers were the ones predominantly available to and utilized by them

on a regular basis. The newspaper accounts of the bribery allegations were prominently displayed and publicly exhibited on the first floor of the courthouse in which the case was tried, the newspaper display being only a few feet from the stairway and the elevators utilized by the jurors in going to and from the courtroom at least four times a day. The newspaper accounts were also prominently featured in the lobby of the Hotel Severs, Muskogee, Oklahoma, where four of the jurors who decided the case resided throughout most of the trial. Ra 34.

The affidavit of alternate juror Freddy L. Crawford revealed that on the two occasions when the jury was removed from the courtroom, there was considerable speculation among the jurors as to the names of the persons present in the courtroom during the jury's absence. On one occasion it was speculated by some of the jurors that Hugh Carroll might have been present in the courtroom. On the other occasion it was speculated that Justice Corn might be present. On one of the occasions, the question was asked of the court official who had charge of the jury as to the reason for the dismissal of the jury from the courtroom. The answer was given by someone, either the court official or another juror, that they were more than certain that Justice Corn or the defendant's wife was testifying in the case. Rs 14-15.

The trial lasted eleven days. The jury returned its verdict of guilty after deliberating for one hour and 48 minutes. Ra 43.

Reasons for Granting the Writ

Petitioner respectfully suggests there are several different reasons for granting a writ of certiorari to the Court of Appeals. First, the failure of the Court of Appeals to apply the rationale enunciated in *Dennis* v. *United States*, 34 U.S.L.Week 4556 (U.S. June 20, 1966), to require that petitioner be granted a new trial for refusal of the trial court to provide him with his own grand jury testimony. Second, the violation of petitioner's constitutional right to a fair trial by a jury not exposed to prejudicial and inflammatory publicity pertaining to bribery of petitioner's fellow member of the Oklahoma Supreme Court, cannot now be vindicated without action by this Court. Third, the Court of Appeals failed to apply the principles of recent decisions by this Court in determining whether prejudicial trial publicity created a "totality of circumstances" so "inherently suspect" as to require a new trial in order that due process of law might be guaranteed to petitioner. Fourth, the evidence introduced by the government through which innuendo and suspicion of petitioner's improper relations with a woman other than his wife was so lacking in evidentiary basis and so prejudicial in nature as to constitute a denial of due process of law.

I. THE DENIAL OF PETITIONER'S OWN GRAND JURY TESTIMONY

In its initial opinion, the Court of Appeals rejected petitioner's argument that he was entitled to a reversal for the failure of the trial court to provide him with a copy of his own grand jury testimony for the reason that petitioner had failed to show a "particularized need" as the Court of

Appeals read *Pittsburg Plate Glass Co.* v. *United States*, 360 U.S. 395, 400 (1959). After *Dennis* v. *United States*, 34 U.S.L.Week 4556 (U.S. June 20, 1966) was called to the attention of the Court of Appeals in the petition for rehearing, the Court of Appeals revised its basis for rejection of petitioner's contention. Although recognizing that the utility of grand jury testimony is a decision to be made by defense counsel under the *Dennis* decision, the Court of Appeals stated:

> "* * * [T]he instant case seems to present a *clear exception* to the rule announced in *Dennis*. The government here did not have exclusive access to 'a storehouse of relevant fact' in the grand jury proceedings. Judge Welch's own testimony would have served the defense no purpose as he did not testify at trial." Rs 12-13. (Emphasis added.)

The first portion of the statement by the Court of Appeals is insupportable in light of the *Dennis* case; the second part is incredible in light of practical experience of any trial lawyer. It is most difficult to determine what "clear exception" to the *Dennis* rule the Court of Appeals could have been referring to, when this Court's opinion stated that it is "rarely justifiable for the prosecution to have exclusive access to a storehouse of relevant fact." It is plain under the facts in this case that the "clearest and most compelling considerations" were not present here to justify an exception to the *Dennis* rule. *Dennis* v. *United States*, 34 U.S.L.Week at 4561.

If the decision by the Court of Appeals is permitted to stand in this case, it will cloud similar cases arising in the Tenth Circuit and other circuits on similar facts in the

future, even under the amendment to Rule 16 of the Federal Rules of Criminal Procedure, effective July 1, 1966, whereby the defendant is permitted to obtain access to his own grand jury testimony. The effect of the Court of Appeals' "exception" in this case is twofold: If the defendant does not take the witness stand, he (1) does not get his own grand jury testimony, and (2) the Court of Appeals will not review the trial court's decision for abuse of discretion. As the opinion of the Court of Appeals in this case showed, it did not review any exercise of discretion by the trial court for possible abuse. It simply stated that there is an exception to the *Dennis* rule when the defendant does not take the witness stand, and under no circumstances is the defendant entitled to his own grand jury testimony in such a case. It is respectfully submitted that guidance is needed in this area lest the Court of Appeals decision in this case frustrate the policy enunciated in the newly enacted amendments to Rule 16 and the *Dennis* case. Since a denial of certiorari would not inform the lower courts of the correctness or error of the decision by the Court of Appeals in this case, it is respectfully submitted that this situation can only be rectified by the granting of the writ.

To assert that the government did not have exclusive access to a "storehouse of relevant fact" is simply blinking reality. Petitioner at the time of his testimony before the grand jury was a man 72 years old, suffering from diabetes, and under doctor's orders required to take regular medication and daily rest. Placed as he was under a circumstance of extreme stress, denied the opportunity to carry out fully his doctor's orders in an attempt to comply with the requests of government attorneys in testifying for a day and a half

before the grand jury, and in a state of mental anguish that could only come to one who has served on the bench of the highest court of the State for over 32 years on being charged himself with a federal crime, it is unrealistic in the extreme to rest on the assumption that petitioner was able to assist in his own defense by recalling questions and answers extending over so many hours, relating to complex financial transactions that extended back over the entire fifty years of his adult life.[4] Petitioner could not assist in the preparation of his own defense in this vital area at the time the pre-trial motion was filed, nor at the time that the all-critical decision had to be made as to whether or not petitioner would take the witness stand in his own behalf.[5]

The Court of Appeals' statement that petitioner's own testimony would have served the defense no purpose because he did not testify, carries with it the inherent premise that petitioner would have had to have taken the stand and subjected himself to cross-examination from that testimony before he would have been entitled to access to it. Such a position makes a mockery of the *Dennis* rule. Petitioner's counsel do not hesitate to state to this Court

---

[4] This case was prosecuted by the government using the net worth method of proof. Therefore, the questioning to which petitioner was subjected for a day and a half before the grand jury was not like that of a defendant in a Dyer Act prosecution. Issues in a net worth income tax evasion case are complex in the extreme. *Holland* v. *United States*, 348 U.S. 121 (1954).

[5] The Court of Appeals did not even discuss the factors that petitioner asserts constitute a showing of "particularized need." It limited itself to establishing an "exception" to the *Dennis* rule which apparently would be automatically applied in the Tenth Circuit every time the defendant did not take the witness stand.

that the principal and overriding reason that petitioner did not testify at that trial was that the defense did not have access to the petitioner's grand jury testimony. The refusal of the Court of Appeals to review the trial court's decision in denying defendant his grand jury testimony imposes an unwarranted penalty on an accused's constitutional right to remain silent.

Petitioner showed to the trial court that he had to have his grand jury testimony to refresh his recollection. Neither this assertion nor the facts upon which it was based were ever controverted by the government. Where it is shown that a witness' grand jury testimony is needed "to refresh his recollection," a case of particularized need is shown. *Dennis* v. *United States*, 34 U.S.L.Week at 4560.

The necessity for a defendant having access to his own grand jury testimony in order to refresh his recollection before trial has been noted by the commentators:

> "Because of the frequent and prolonged delays between the grand jury hearing and the trial, such refreshment of recollection is often a grave necessity if the witness is to avoid entrapment due to inconsistencies, an inevitable result of the passage of time. Without such refreshment, a witness is often at the complete mercy of the prosecution, which can impeach his testimony directly or indirectly on matters most damaging to the defense while leaving sealed that testimony which, if brought to the attention of the witness, might clarify or nullify the adverse evidence elicited." Calkins, *Grand Jury Secrecy*, 63 Mich.L.Rev. 455, 484 (1965).

This Court noted the validity of this position, which has been taken by other courts and commentators, in its opinion in *Dennis*, 34 U.S.L.Week at 4560, n. 17.

None of the reasons commonly advanced for the maintenance of the secrecy of grand jury proceedings apply to the petitioner's own testimony in this case.[6]

The amendment to Rule 16 of the Federal Rules of Criminal Procedure, effective July 1, 1966, and transmitted to Congress, now authorizes discovery and inspection of a defendant's own grand jury testimony. The reasons for this change in the rules reflect a requirement of basic fairness, especially, where as here, the government's interest in preserving the secrecy of the grand jury minutes is minimal.

It is anomalous in a system of criminal procedure devoted to the achievement of justice and not of convictions that petitioner should not have been granted access to his

---

[6] Generally, five reasons have been advanced for the justification of the secrecy of grand jury testimony: (1) To prevent the accused from escaping before he is indicted or arrested, or from tampering with witnesses against him; (2) To prevent disclosure of derogatory information presented to the grand jury against the accused who has not been indicted; (3) To encourage witnesses to come before the grand jury and speak freely without fear that their testimony will be made public; (4) To encourage grand juries to engage in uninhibited investigation and deliberation by barring disclosure of their votes and comments during proceedings; (5) To protect the innocent accused, who is exonerated from disclosure of the fact that he has been under investigation. To the extent that these reasons have any validity, it is obvious that none of them exist where the accused has been indicted and is in the process of standing trial on the charges leveled by the grand jury. See Brennan, *The Criminal Prosecution: Sporting Event or Quest for Truth?*, 1963 Wash.U.L.Q. 279; Sherry, *Grand Jury Minutes, The Unreasonable Rule of Secrecy*, 48 Va.L.Rev. 668 (1962); Calkins, *Grand Jury Secrecy*, 63 Mich.L.Rev. 455 (1965).

own grand jury testimony. The only way in which this defendant's constitutional right to a fair trial can be guaranteed is by this Court granting him a new trial at which the government will not have exclusive possession of the "storehouse of relevant fact" contained in petitioner's grand jury testimony. Indeed, with the decision of the Court of Appeals permitted to stand in this case, the rights of future defendants under the amendment to Rule 16 will be unnecessarily clouded.

It is submitted that the Court of Appeals failed to apply the *Dennis* decision properly and that such failure warrants the granting of the writ.

II. THE PREJUDICIAL PUBLICITY

Among the exhibits certified to this Court by the Court of Appeals are news clippings from the major metropolitan newspapers containing representative selections of the pre-trial and trial publicity attendant to petitioner's case. These news clippings are attached as exhibits to petitioner's Motion for Continuance, Motion to hear in chambers, out of the presence of the jury panel and the public, the testimony of the witnesses N. S Corn and Hugh A Carroll, and Motion for New Trial. Several of the headlines and articles which formed the background against which petitioner was tried and those containing the objectionable and highly prejudicial news stories are reproduced as fold-outs in the appendix to this petition.

A. The Pre-trial Publicity

While petitioner cannot say that he was denied due process by virtue of the influence of pre-trial publicity

alone, it must be considered as the "setting in which the trial was held," *Sheppard* v. *Maxwell,* 34 U.S.L.Week 4451, 4457 (U.S. June 6, 1966), to judge the impact of the trial publicity to which the jury was exposed.

While it is true that the law cannot guarantee a defendant that, in the words of the Court of Appeals, his cause will be submitted to "automated jurors existing in complete sterility," this Court has in several instances concluded that the "totality of circumstances," *Sheppard* v. *Maxwell, supra,* at 4456, requires the conclusion that the jury had been tainted by exposure to news releases or other improper extraneous influence. *Irvin* v. *Dowd,* 366 U.S. 717 (1961); *Rideau* v. *Louisiana,* 373 U.S. 723 (1963); *Janko* v. *United States,* 366 U.S. 716 (1961); *Turner* v. *Louisiana,* 379 U.S. 466 (1965); *Estes* v. *Texas,* 381 U.S. 532 (1965); *Sheppard* v. *Maxwell, supra.* Petitioner contends that the totality of circumstances surrounding this trial require the application of the rule that prejudice will be presumed even in an absence of a direct showing that the jury read the prejudicial news articles.

There is in this case, moreover, a feature as to the pretrial publicity, to which all of the 28 prospective jurors except one were exposed, which was not present in the above cases cited. That is the fact that the government by its actions prior to the trial of this case was responsible for creating the setting in which the news reporting that occurred during trial operated to deprive petitioner of a fair trial.

It was the government's decision to hold up Justice Corn's case in Washington for over a year after it was ready for presentation to a grand jury and to bring it to

the same grand jury to which petitioner's case was presented. The impact on the public of the revelation of two justices of the Oklahoma Supreme Court being indicted for income tax evasion was overwhelming and the press played the accounts to the fullest extent.

The linking of petitioner's case with that of Justice Corn on the basis of income tax evasion charges alone might well have not produced serious adverse consequences to the petitioner had it not been for the actions of government attorneys taken at the sentencing hearing of Justice Corn on July 1, 1964, just three months before petitioner's trial. After Justice Corn had entered a plea of *nolo contendere* to the charges against him, the government then saw fit to read a public statement asserting that it had a "witness" who would testify that he had paid $150,000 to Justice Corn to secure a favorable decision in a case pending before the Oklahoma Supreme Court in 1957 which was for Justice Corn and "others" on the Oklahoma Supreme Court. Of course, the only "other" member of the Oklahoma Supreme Court then charged with any crime of any sort was petitioner. As the newspaper accounts in Exhibit 1 to defendant's Motion to hear the testimony of Justice Corn and the "witness" Hugh A Carroll out of the hearing of the public and the jury demonstrate petitioner's case was immediately linked to the statement by the government prosecutors about the bribe paid to a member of the Oklahoma Supreme Court. By virtue of this publicity, it was impossible from this point on for petitioner to divorce his case from the bribe charges leveled by the government in Justice Corn's case.

As the newspaper accounts appearing during trial set forth in Exhibit 2 to defendant's Motion for New Trial show, the linking of petitioner's case with the bribe charge occurred in virtually every article that appeared during the course of the trial. The fact that it was the government's action which produced this result is an important factor in determining that the prejudicial publicity which occurred during trial denied the petitioner's constitutional right to a fair trial. See *Shepherd* v. *Florida,* 341 U.S. 50 (1951) (concurring opinion); *Stroble* v. *California,* 343 U.S. 181, 201 (1952) (dissenting opinion by FRANKFURTER, J.); *Henslee* v. *United States,* 246 F.2d 190 (5th Cir. 1957), *cert. denied* 359 U.S. 984 (1959); *United States* v. *Ogden,* 105 Fed. 371 (3rd Cir. 1900); *Briggs* v. *United States,* 221 F.2d 636 (6th Cir. 1955); *Coppedge* v. *United States,* 272 F.2d 504 (D.C. Cir. 1959), *cert. denied* 368 U.S. 855 (1961); *Stunz* v. *United States,* 27 F.2d 575, 577 (8th Cir. 1928); *People* v. *Becker,* 215 N.Y. 126, 109 N.E. 127 (1915).

There was no excuse for the prosecution to have made a statement about bribery in Justice Corn's case, closely connected as it was to petitioner's, and in which the government had a plea which would send Justice Corn to prison.

B. The Trial Publicity

With this publicity forming the background, Justice Welch went to trial in Muskogee, Oklahoma, on October 5, 1964. The government had been advised prior to the trial by Justice Corn's attorney that if called he would invoke the Fifth Amendment and refuse to answer any questions on the grounds that they might tend to incriminate him. See Affidavit of Corn's attorney attached as Exhibit 1 to

petitioner's Motion for New Trial. Petitioner knew that the testimony of witness Hugh Carroll could not connect him in any way to the alleged bribe. Therefore, petitioner filed a Motion to hear the testimony of the witnesses Corn and Carroll out of the hearing of the jury and out of the hearing of the public in order to determine (1), if Corn would invoke the Fifth Amendment under oath, and (2), the admissibility of the witness Carroll's testimony if he were not able to connect up the bribe payoff to the petitioner in any way. This action was taken by petitioner because even if the testimony of these witnesses were taken out of the hearing of the jury, it would be impossible to insure that the jury could be insulated from the publicity that would be given to the testimony taken in open court. Apparently because of the novelty[7] of petitioner's suggestion, the court overruled petitioner's motion, and heard the testimony of the witnesses out of the presence of the jury but in open court.

The results of the testimony of these two witnesses were exactly as had been foreseen by petitioner. Flaming, sensational headlines proclaimed Corn's taking of the Fifth Amendment and Carroll's testimony about payment of a $150,000 bribe to Corn for himself and "other" members of the Oklahoma Supreme Court. These headlines pertaining to Corn's appearance greeted the jury after it was dismissed for its week-end recess at the conclusion of the first week of trial:

---

[7] But see *United States* v. *Powell*, 171 F.Supp. 202 (N.D.Cal.S.D. 1959).

CORN TAKES THE FIFTH IN EARL WELCH TRIAL

CORN INVOKES THE FIFTH AMENDMENT
17 TIMES AT TRIAL HERE OF
FELLOW SUPREME COURT JUSTICE

CORN REFUSES TO ANSWER ANY
QUESTIONS AT WELCH TRIAL

JUDGE CORN TAKES FIFTH REPEATEDLY

Rs 31-39.

Pictures of Judge Corn appeared in the newspapers heralding his appearance at the trial in the custody of U. S. Marshals, since he was at that time serving his sentence at the federal penitentiary in Springfield, Missouri. That the jury was exposed to these newspaper headlines and articles cannot be denied, since the jurors passed by the billboard display containing the Friday evening accounts on the way out of the courthouse Friday, they were prominently displayed in the hotel lobby at the hotel where four of the jurors were residing, and they appeared in all of the newspapers which were servicing the jurors who sat on the panel. Radio and television accounts were extensive and it may be assumed that most of the jury had access to these media. *Sheppard* v. *Maxwell, supra,* at 4454.

Consistent with the speculation in the newspaper articles over the weekend, Hugh Carroll appeared at the trial on Monday at the commencement of the second week of trial. His testimony too was heard in open court, although out of the presence of the jury. Once again the newspapers bannered his sensational disclosures:

CARROLL AIRS $150,000
PAY-OFF TO JUSTICE CORN

Investment Chief's Testimony
Barred From Welch Jury

CARROLL CONFIRMS BRIBE; NOT
ADMISSIBLE IN WELCH CASE

CARROLL ALLEGES $150,000 PAY-OFF TO CORN

CARROLL'S TESTIMONY OF "$150,000 GIFT"
RULED OUT AS WELCH EVIDENCE

JURY MISSES TESTIMONY ON BRIBE MONEY

Rs 41-49.

There is rather positive evidence that these news accounts reached the jury's attention. In the affidavit of alternate juror Crawford (Exhibit 6 to Motion for New Trial) it appears that speculation occurred among the jury on both occasions that they were absent from the courtroom about who was present in the courtroom during their absence. The names of Corn and Carroll were among those mentioned in the jury's discussions. The Court of Appeals took this "speculation" among the jurors very lightly, and engaged in the comfortable assumption that jurors often speculate about trial proceedings conducted out of their presence, sometimes accurately and sometimes inaccurately. The Court of Appeals stated:

> "And for what it is worth, we accept as a reality the natural and human frailties of jurors, such as curiosity, as potential instruments of prejudice." Rs 6.

It is just this sort of relaxed attitude toward the possibility that petitioner did not obtain a fair trial that marked the entire treatment by the Court of Appeals of

petitioner's assertion that he had been denied a fair trial by virtue of the prejudicial publicity. What the Court of Appeals ignored was that the speculation about the appearance of Corn by the jury was speculation about bribery: the ugliest word that can be used in connection with a judge.

The newspaper reporters accurately caught the mood of the courtroom as it awaited the appearance of Justice Corn:

> "The impending appearance of Corn gave the courtroom an electrified atmosphere throughout the morning as speculation was high whether he would answer government questions or resort to the Fifth Amendment."
>
> —Tulsa Tribune
> October 9, 1964

Justice Corn did not appear until well into the morning proceedings and the news account captured graphically the circumstances surrounding the "speculation" about Justice Corn's appearance by the jury far better than a dry record.

The government attorneys and trial judge refused to take the one step that could have been taken in the case to have prevented any possibility that the publicity about Corn's or Carroll's appearances at the trial and testimony would reach the jury. This failure on the part of the trial judge to "insulate the proceedings from prejudicial publicity," *Sheppard* v. *Maxwell, supra*, at 4445, n. 11, deprived petitioner of a chance to receive a fair hearing. It is true that the request made by petitioner was not a traditional request. However, "traditional safeguards" are clearly not enough any longer under *Sheppard*.

The basic question in this case is whether evidence of the crime of bribery to which the jurors were exposed through newspaper accounts, even though accurately depicting what occurred in the courtroom, requires a new trial. It is plain under *Marshall* v. *United States*, 360 U.S. 310 (1959), that if the record demonstrated that the jurors had admittedly read the newspaper accounts, reversal would be required. The question now is, and the Court of Appeals refused to face it, whether the rationale of decisions such as *Sheppard, Estes, Rideau,* and *Turner,* apply to factual newspaper reporting of matters occurring in the courtroom which the jury was not permitted to hear, but to which they were exposed under circumstances which make it inherently suspect that the matters in fact reached them. The Court of Appeals dismissed this argument with the following statement:

> "To conclude that appellant was denied a fair trial because of the factual reporting of Judge Corn's appearance in court and the witness Carroll's inadmissible testimony requires the application of dual presumptions: That the jurors were both exposed to the publicity and were prejudiced thereby. The law will presume neither, see Beck v. Washington, 369 U.S. 541, 558, rehearing denied, 370 U.S. 965; Latham v. Crouse, 10 Cir., 330 F2 865, 867-68, cert. denied, 379 U.S. 866, and appellant has failed to show either as a 'demonstrable reality,' United States, ex rel Darcy v. Handy, 351 U.S. 454, 462."

This is an erroneous statement of the law as set down in the decisions by this Court noted above. In *Rideau* this Court laid to rest the requirement that the defendant has the

burden of showing "essential unfairness * * * as a demonstrable reality," 373 U.S. at 726, where the community has been exposed in depth to publicity about matters which are not admissible at the trial. In fact, both presumptions will, and have been made by this Court in the cases noted above where the "totality of circumstances" make the proceedings "inherently suspect." *Sheppard* v. *Maxwell, supra; Estes* v. *Texas, supra,* at 554.

The Court of Appeals contented itself with distinguishing the above cases decided by this Court on these issues on a factual basis. Petitioner has never asserted that the facts in this case are identical to any of those previously considered by this Court; but he strongly has asserted that the principles enunciated in those cases require that he be granted a new trial.

The Court of Appeals concluded that since the matters reported in the newspapers in petitioner's case constituted factual reporting of matters appearing in the courtroom, no prejudice could be presumed to have arisen as a result thereof. This ignores the fact that the flaming headlines were about bribery, a totally different crime from that for which petitioner was tried and to which the jury was never supposed to have been exposed. Reaching the jury as it must have in this case, the damage to petitioner was as great as or greater than if it had been heard by the jury in open court. *Marshall* v. *United States,* 360 U.S. at 313.

The news media cannot be entirely blamed for the recording of what occurred in the courtroom. Indeed, as the chairman of the Freedom of Information Committee of

the Oklahoma Professional Chapter of Sigma Delta Chi stated in one of the news accounts appearing during the trial:

> " 'The news media cannot be expected to exercise censorship on testimony presented in open court that was heard by every person in the courtroom,' Palmer declared.
>
> " 'The testimony was offered by the prosecutor and permitted by the trial judge. The news media could not ignore it simply because it was not given in the presence of the jury.' "

Mr. Palmer's remarks were made in response to criticisms by a prominent Tulsa attorney of the reporting of the events transpiring at petitioner's trial. Rs 53.

It is respectfully submitted that the Court of Appeals' review of the circumstances surrounding the exposure of the jurors that tried petitioner to the publicity concerning bribery of a fellow member of the Oklahoma Supreme Court was woefully inadequate. Outdated principles of law were applied and realities were ignored. Petitioner did all in his power to prevent publicity from infecting the trial of his case. The trial judge did nothing beyond instructing the jury to ignore publicity, either by impounding the jury on his own motion, *Sheppard* v. *Maxwell, supra,* or by granting petitioner's request to hear the testimony of the two key witnesses in a form that would prevent a public disclosure during trial of their testimony. The importance of the application of the principles enunciated by this Court in *Sheppard, Estes,* and others, to the fact situation identical to that contained in *Marshall* underlines the importance of the granting of the writ in this case.

III. The Inadmissible Evidence

The government prosecuted the petitioner's case by using the net worth method of proving unreported taxable income. The basic issue before the jury was whether funds expended during the prosecution years, 1957-1961, admittedly in excess of reported income, represented the disposition of funds which the petitioner had on hand at the beginning of the prosecution period or unreported taxable income received in the years involved. The evidence was in direct conflict, petitioner's evidence showing that he had over $56,000 in cash on hand at the beginning of the prosecution period and the government's evidence, if believed, showing that petitioner had in fact a deficit of $17,000 at such time.

In order to establish an opening net worth, the government traced petitioner's financial history from 1913 through 1956. As a part of its analysis showing expenditure of funds by petitioner during these pre-prosecution years, the government introduced a vast amount of documentary evidence and attempted to elicit testimony from many witnesses to show that Judge Welch had provided the funds for the purchase of a house located at 2620 North Robinson, Oklahoma City, Oklahoma. In fact, this testimony had the effect of putting Judge Welch's moral character on trial and created a "trial within a trial." Judge Welch's present wife, Mrs. Ruby Meyers Welch, a lady of like age and in a family of long acquaintance, whom he married in June, 1959, resided with her family in the house in question prior to her marriage to petitioner. At the time of the home purchase in 1953, petitioner was married to his second wife, Mrs. Fern Welch. They were divorced in 1958. Ra 81, 156.

Over objection of counsel for petitioner, the government was permitted to ask the witness, Fern Welch, if she knew that Judge Welch were spending money on "another woman" prior to her separation from him in 1958. She stated that she did not know that. Ra 51.

The government's witness, Mabel R. Miller, testified, over objection, that in 1949 she had a conversation with Judge Welch at her home in which petitioner stated that he was negotiating for a house between 25th and 26th on North Robinson in Oklahoma City for a "lady acquaintance" to live in. The trial court overruled defendant's motion to strike the testimony of the witness as irrelevant, immaterial, incompetent and prejudicial, subject to the testimony being connected up by the government. Ra 54-55.

Two other women witnesses testified that they had seen Judge Welch at Mrs. Meyers' apartment between the years 1947 and 1955. This testimony was also admitted over petitioner's objection and the court overruled petitioner's motion that it be stricken subject to the testimony being connected up to an actual expenditure of funds by petitioner during the pre-prosecution years. Ra 59, 177A-178. The government then introduced a vast amount of documentary evidence to attempt to show that Judge Welch had expended the funds for the house purchase in question. Plaintiff's Exhibits 102-117, 120, 127-128,[8] are all documents relating to the house purchase and in not a single one of them does Judge Welch's name appear as being involved in the purchase of the house in any manner. Throughout the trial the government examined relatives of petitioner as to their knowledge of petitioner's relationship with his present

[8] These exhibits are a part of the certified record on appeal.

wife prior to their marriage and while he was still married to his former wife. Over one-fourth of the closing argument of the government was spent in dealing with this alleged purchase by petitioner.

The total amount of the purchase price included on the government's computation of funds was $7,698.45, euphemistically labeled "gift to Ruby Meyers."[9] Yet, as noted above, the government had established a deficit on the part of the petitioner, if its figures were believed, of over $17,000 for the pre-prosecution years.

There were three married women jurors on the panel that returned a verdict of guilty. Ra 90-154.

Nothing in the testimony of the above witnesses or in the documentary evidence in any way proved any element of the government's case against petitioner on a charge of income tax evasion. The net result of the testimony, the documentary evidence, and the prosecutor's closing argument was to try the petitioner for personal immorality, rather than for income tax evasion.

Because the evidence which the government introduced in support of its claim that petitioner made the down payment on the house in question could not by any stretch of the imagination raise the inference that he had in fact spent the money, the trial court erred in letting this highly prejudicial testimony go to the jury for consideration. Introduction of evidence of other crimes or offenses not

---

[9] Item No. 29, p. 11, Government Exhibit 224.

connected with that charged is reversible error, *Boyd* v. *United States*, 142 U.S. 450 (1892); *Blumberg* v. *United States*, 222 F.2d 496 (5th Cir. 1955); especially where that other evidence relates to the defendant's alleged improper sexual relations, not related to the crime charged. *Phillips* v. *State*, 85 Okla. Cr. 81, 185 P.2d 239 (1947); *People* v. *Donaldson*, 8 Ill.2d 510, 134 N.E.2d 776 (1956).

While this Court on certiorari normally will not review matters of evidence, nevertheless the evidence here introduced was so totally devoid of "evidentiary support" and was so highly prejudicial in its nature that the conviction of petitioner is unconstitutional as a denial of due process. *Washington* v. *United States*, 357 U.S. 348 (1958); *Thompson* v. *City of Louisville*, 362 U.S. 199 (1960); *Garner* v. *Louisiana*, 368 U.S. 157, 163 (1961).

When the required balancing of the need of the government for the testimony as against the potential prejudicial effect of the testimony is made, it is clear that error was committed by the trial court in admitting this evidence. The government had not the slightest need for the evidence under its view, since it already had petitioner $17,000 in the hole by the commencement of the prosecution period. The elimination of something over $7,000 of this sum from its computations would not have affected the government's view of the case in any way. But the prejudicial effect of the introduction of the testimony, without any evidentiary support for the inference which it was supposed to bear, deprived petitioner of a fair trial.

The Court of Appeals totally misconstrued petitioner's argument. It stated:

> "Appellant does not directly attack the admission of this evidence as immaterial to the issues, nor as insufficient in circumstances to support an inference that such an expenditure was made." Rs 11.

The position of petitioner is exactly the opposite of that stated by the Court of Appeals. The evidence was improperly admitted because it was immaterial to the issues and it was not sufficient to support an inference that the expenditure for which the petitioner was charged was made. The emphasis on the matter by the prosecution did permeate the trial with "innuendo of immorality, even adultery," Rs 11, entirely independent of the charge of tax evasion and thus set up a "trial within a trial." *United States* v. *Klein,* 131 F.Supp. 807, 811 (S.D. N.Y. 1955).

The Court of Appeals in its opinion outlined the evidence which the government had to support the inference that petitioner had made the expenditure claimed. Rs 10-11. Except for the last item listed, there is not a single bit of the evidence which would support the conclusion that petitioner had expended any funds for the house purchase. Moreover, when the Court of Appeals stated that "Judge Welch made substantial withdrawals from his savings accounts at such time.", and that the "evidence showed that Judge Welch, on the date the purchase was closed, purchased $6,000 in cashier's checks," Rs. 11, it was in direct error. The purchase of the house was made on August 4, 1953. Judge Welch made withdrawals totaling $6,000.00 on July 27, 1953.[10] Plaintiff's Exhibits 61-A, 61-B, and 62-C are cashier's checks issued to petitioner by the same banks from which the withdrawals were made, all dated July 27, 1953,

---

[10] Plaintiff's Exhibits 43 and 44.

totaling $6,000.00, all of which were negotiated almost a year later to third persons as shown by the endorsements thereon. The record does not reveal that petitioner made any withdrawals from his bank accounts on the date of the purchase of the house, August 4, 1953, nor that any checks executed by him ever went into the house purchase.

It is respectfully submitted that the Court of Appeals failed adequately to review petitioner's contention that the evidence containing innuendo and suspicion of personal immorality on the part of petitioner created an atmosphere in which it was impossible for petitioner to secure a fair trial. The evidence, bearing false connotations of petitioner's personal life, was even more damaging to petitioner in the indirect manner in which it was presented than if it had been a direct issue in the case. It is respectfully submitted that petitioner's right to a fair trial can only be vindicated by the granting of the writ and the total lack of evidentiary support for the highly prejudicial evidence justifies that action by this Court.

IV. The Combination of Errors

It is submitted that the combination of errors which infected petitioner's trial require that a writ of certiorari be granted. The errors may be briefly listed: (1) The linking by the government of petitioner's case with that of Justice Corn; (2) The revelation by the government in Justice Corn's case of a bribe paid to Justice Corn and implicating "others" on the Oklahoma Supreme Court;

(3) The linking in the pre-trial and trial publicity of Justice Welch with the bribery allegation made by the government; (4) The failure of the trial judge to impound the jury on his own motion; (5) The refusal of the trial judge to hear the testimony of the witnesses Corn and Carroll out of the presence of the jury and out of the presence of the news media to prevent evidence extraneous to the issues reaching the jury by way of the newspaper accounts; (6) The exposure of the jurors to the newspaper accounts of the testimony of Corn and Carroll reflecting that a bribe had been paid to petitioner's fellow member of the Oklahoma Supreme Court, and effectively informing the jury that they would not be permitted to hear such testimony; (7) The combination of circumstances which make it clear that the consideration of the jury was tainted by revelations of bribery via the news media accounts of the trial; (8) The failure of the petitioner to have access to his grand jury testimony in order to make the critical decision as to whether to take the stand or not; (9) While evidence that was not supposed to go to the jury was made available to them by the newspapers, they were permitted to consider evidence tending to show petitioner's personal immorality, a subject totally unconnected with the crime charged and not supported by any competent evidence.

While petitioner's trial might survive constitutional scrutiny if only one or two of the above circumstances had been present, it is submitted that the combination of all of them vitiated his right to a fair trial. Appellant must be granted a new trial if our system of criminal justice is to

achieve the lofty standard herebefore enunciated by this Court of preventing "even the probability of unfairness." *In re Murchison*, 349 U.S. 133, 136 (1955).

Conclusion

For the reasons above stated, petitioner respectfully suggests that a writ of certiorari ought to issue to review the judgment of the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

V. P. CROWE
PAUL R. MCDANIEL
570 First National Building
Oklahoma City, Oklahoma

TOM FINNEY
Idabel, Oklahoma

Counsel for Petitioner

September, 1966

FILED
United States Court of Appeals
Tenth Circuit
JUN 22 1966
Robert B. Cartwright
Clerk

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

May Term, 1966.

EARL WELCH, Appellant,	)	
vs.	)	No. 8097
UNITED STATES OF AMERICA, Appellee.	)	

Appeal from the United States District Court
for the Eastern District of Oklahoma

V. P. Crowe (Paul R. McDaniel of Crowe, Boxley, Dunlevy, Thweatt, Swinford & Johnson and Tom Finney were with him on the brief) for Appellant.

Donald A. Hansen (Richard M. Roberts, Acting Asst. Attorney General, Bruce Green, United States Attorney, E. C. Nelson, Assistant United States Attorney, Joseph M. Howard and Willard C. McBride were with him on the brief) for Appellee.

Before LEWIS and BREITENSTEIN, Circuit Judges, and STANLEY District Judge.

LEWIS, Circuit Judge.

Appellant, a former Justice of the Supreme Court of Oklahoma, was found guilty by a jury verdict on all five counts of an indictment charging him with wilfully and knowingly attempting to evade income taxes for the years 1957 through 1961 in violation of 26 U.S.C. 7201 and was sentenced to concurrent prison terms of three years and fined $13,500. Thereafter appellant filed a motion for judgment of acquittal or alternatively a motion for a new trial, both of which were denied. He now seeks review of the order overruling his post-trial motions and of the judgment entered pursuant to the jury verdict. The issues before us arise in the main from appellant's contentions that jury prejudice should be presumed from the widespread news coverage preceding and during the trial and that the court erred in certain evidentiary rulings and in not allowing a new trial as a result of juror misconduct.

Using the net worth and nondeductible expenditure method of accounting the government determined that appellant had an unreported taxable income of $41,826.60 during the prosecution years of 1957-1961. The government's computation is premised upon an accounting of appellant's income and expenditures throughout his years of professional service from 1912 to 1955. During this period Justice Welch practiced law in Antlers, Oklahoma from 1911 to 1926, served as state district judge from 1927 to 1932 and was a Justice of the Oklahoma Supreme Court from 1933 to 1961.

Appellant claimed that his unreported, nondeductible expenditures for the years in question came from an accumulated cash fund of over $56,000 and not from income. The government, however, introduced extensive and detailed evidence, too voluminous for our definitive presentation, in establishing that its indictment was based upon the expenditure of unreported income rather than the claimed accumulated cash funds.

A summary of the government evidence showed that appellant spent $17,521.00 in excess of receipts from 1912

through 1955 making it impossible for him to have acquired a large cash fund. On the other hand appellant presented evidence that he had saved $56,000.00 in cash funds by the end of 1956. In refuting this claim the government contended that even if it used the figures furnished by the appellant, he would have accumulated no more than $36,750.00 by 1933 and that this cash fund would have necessarily been expended by 1956. The issue presented to the jury for factual determination was whether Justice Welch did or did not have a cash hoard sufficient to offset his expenditures during the prosecution years. The sufficiency of the evidence to support the verdict of guilty is not attacked directly on appeal but serves as a premise for the claim of error in the admission of evidence and as a background for the asserted prejudicial impact of publicity upon the trial.

Justice Welch was indicted on April 9, 1964, at Oklahoma City. Upon that same date and by the same grand jury Justice N. S. Corn, at such time a supernumerary member of the Supreme Court of Oklahoma, was charged in a separate indictment with similar offenses. On July 1, 1964, Justice Corn entered a plea of *nolo contendere* to the counts of his indictment and was sentenced to a fine and concurrent imprisonment terms of eighteen months. The United States represented to the sentencing judge that Justice Corn had received a bribe of $150,000 in return for a favorable judicial decision in a state supreme court case and that he had indicated to a witness that the money was to help him and "other members of the Supreme Court in meeting campaign expenses." This statement of the United States District Attorney together with Justice Corn's plea and sentencing received extensive publicity in all forms of news media. And securely packaged in the news coverage was the fact of appellant's pending trial, his association with Justice Corn, the assertion of corruption of Justice Corn and "others," and the linking of the name

of Hugh A. Carroll, a former president of Selected Investments Corporation, as a "witness."[1]

---

[1] The Oklahoma City Times reported on July 1:

"Government attorneys charged Wednesday that Supernumerary Judge N. S. Corn and 'others' on the state supreme court received $150,000 in return for a favorable ruling in a pending case.

"Shortly after disclosure that the government's charge was the basis of a federal income tax evasion indictment against Corn, the 80-year-old retired justice was sentenced to 18 months in prison and fined $11,250.

• • • • • • •

"A statement read by U. S. Attorney B. Andrew Potter who was flanked by two justice department attorneys, did not identify by name the person they said gave the $150,000 to Corn.

"Potter merely referred to a 'witness who was interested in a case pending before the Oklahoma Supreme Court in 1956.'

"One of the witnesses who testified before the federal grand jury that indicted Corn and Justice Earl Welch April 8 was Hugh A. Carroll, onetime president of the now-defunct Selected Investments Corp.

• • • • • • •

"Welch is accused of evading $13,364 in taxes for 1957 through 1961. He pleaded innocent and his case has since been transferred to the eastern district at Muskogee.

• • • • • • •

"But Potter said the government had both oral and documentary evidence, if the case had gone to trial, to prove another source of the net worth increases resulting in unreported income.

"He said the testimony would show that in 1956 the 'witness' told Corn that, unless the court reversed a lower court's decision in the pending case, the corporation the 'witness' controlled would suffer a tremendous loss.

"Potter said Corn asked the 'witness' how much it was worth to him for the favorable decision.

"'Worth $150,000'

"'. . . The witness told the defendant it was worth $150,000 to which defendant replied that he felt something might be worked out,' Potter related.

"He pointed out the supreme court reversed the lower court decision in 1957, whereupon the 'witness' paid $150,000, most of it in $100 bills, to Corn.

"Corn indicated to the 'witness' that the $150,000 would go to help himself and 'other members of the supreme court in meeting campaign expenses,' Potter charged."

Judge Welch had authored an opinion favoring Selected Investment Corporation in a 1957 decision.

Trial of appellant's case began on October 5, 1964, at Muskogee, Oklahoma, after transfer from the Western to the Eastern District of Oklahoma. Publicity of the proceedings continued in the same vein and appellant's motion for continuance upon claim of prejudice therefrom was denied. During the course of the trial the government called as witnesses both Justice Corn and Hugh A. Carroll in an attempt to show a probable source of income to appellant. Justice Corn invoked the Fifth Amendment and declined to answer any questions. Carroll testified to the bribery of Justice Corn but did not implicate Justice Welch. The testimony was taken in open court but in the absence of the jury, appellant's motion to hear the witnesses in chambers having been denied. The court ruled the testimony to be inadmissible. News media headlined the appearance and testimony of these witnesses.

In urging that appellant did not receive a fair trial before an impartial jury because of the attendant publicity given the proceedings, no claim of actual prejudice or specific error in the application of traditional safeguards by the trial court is made. And the record reveals no proven prejudice nor trial error. Voir dire examination of prospective jurors was complete and, perhaps surprisingly, revealed that the panel members had little knowledge of the case beyond the fact of its existence. None was challenged for cause. The trial jury was properly and repeatedly instructed not to read or listen to news media during the trial and their responsibilities in such regard were made emphatically clear to them. The jury was allowed to separate at night and over a weekend but no request to impound them was made. But, says appellant, these traditional procedures of accepting as unprejudiced a juror who subjectively so states although exposed to publicity, of placing reliance upon the impact of court instructions to avoid juror exposure to trial publicity, of requiring an affirmative showing the existence of prejudice, are each but

"reality-obscuring myths" which should be rejected in view of the present-day exposure and influence of news media on the common life. In sum, appellant says he did not have a fair trial because he could not have one under a reality-recognizing legal concept of justice and due process. We cannot approve such a legal philosophy and find no support for it in the decisions of the Supreme Court termed "revolutionary" by appellant.

In support of post-trial motions appellant submitted affidavits indicating that headlined papers were prominently displayed in the lobby of a hotel where some of the jurors stayed. Another affidavit indicated that some conversational speculation occurred among members of the trial jury as to what was occurring and who might be testifying (including mention of Corn and Carroll) during a period when the jury was excused. In regard to the latter we have no doubt that jurors often speculate about trial proceedings conducted out of their presence, sometimes accurately, as here, and sometimes inaccurately, also as here. And for what it is worth, we accept as a reality the natural and human frailties of jurors, such as curiosity, as potential instruments of prejudice.

Fairness in the administration of justice is not a one-way street to be approached only through an entrance limited to the accused. His cause cannot be submitted to automated jurors existing in complete sterility. And prominence of position deserves no special consideration. To the contrary, the administration of justice requires that the personal and professional conduct of any judge be a subject for public concern and knowledge, continued scrutiny, and, in proper instances, authoritative action. News media not only have a right to report upon the subject, Estes v. Texas, 381 U.S. 532, 541, rehearing denied, 382 U.S. 875, but have a professional duty to do so that extends beyond the term newsworthy. The exercise of free reporting, the so-called "extensive publicity" given to a case, is a right that must

be balanced against the right of an accused to be tried by an impartial jury but does not dictate the conclusion that prominence brings prejudice. But we agree that the prominence of publicity *may* produce prejudice, actual or so inherent in the circumstance that realism requires its recognition. We reject, therefore, appellant's argument that he *could* not receive a fair trial because of his high position and the attendant publicity of his arrest and trial and turn to the question of whether he *did* receive a fair trial. And, in such regard, we consider the decisions of the Supreme Court that appellant terms "revolutionary" to be, indeed, realistic.

In Marshall v. United States, 360 U.S. 310, jurors hearing a routine criminal case were exposed, during the course of the trial, to newspaper articles of a reckless nature covering matters far removed in time and space from a factual report of the trial occurrence. The accounts apprised the jurors of the defendant's prior criminal record and other matters which the trial judge had earlier ruled prejudicial and inadmissible. Exercising its supervisory powers, the Supreme Court ordered a new trial indicating that evidence which reaches a jury through news accounts is almost certain to be as prejudicial as when it is part of the prosecution's evidence. The Court added: "It may indeed be greater for it is then not tempered by protective procedures." Marshall v. United States, supra at 313.

Marshall can be distinguished from the case at bar in several ways. There the jurors were actually exposed to extraneous matters during the course of the trial; here there is no showing that any juror violated the court's instructions and admonitions nor was actually exposed to the news or views of communication media, To conclude that appellant was denied a fair trial because of the factual reporting of Judge Corn's appearance in court and the witness Carroll's inadmissible testimony requires the application of dual presumptions: that the jurors were both

exposed to the publicity and were prejudiced thereby. The law will presume neither, see Beck v. Washington, 369 U.S. 541, 558, rehearing denied, 370 U.S. 965; Latham v. Crouse, 10 Cir., 330 F2 865, 867-68, cert. denied, 379 U.S. 866, and appellant has failed to show either as a "demonstrable reality," United States ex rel. Darcy v. Handy, 351 U.S. 454, 462.

In *Marshall* the jurors were interrogated by the trial judge during the trial itself as to the subjective effect of the publicity to which they had been exposed. Each juror expressed the view that he was not and would not be prejudiced by the newspaper account. The jurors' self analysis of their state of mind and the trial judge's concomitant finding in such regard were held not sufficient to assure a fair trial. But the situation in *Marshall,* coming as it did during the course of the trial, denied to that defendant the right to reject each juror's claim of freedom from prejudice and he was forced to submit his cause to the jury already impaneled. In the case at bar, the proven exposure of the jurors to publicity was limited to the reporting of pre-trial events, essentially the events of simultaneous indictment of appellant and Corn and the sentencing of the latter. See n. 1, supra. The procedural safeguards of voir dire examination and challenge, the latter denied by circumstance in *Marshall,* were here present and fully available to appellant. And the record reveals a voir dire completely satisfying the standards set by the Supreme Court and expressed in Irvin v. Dowd, 366 U.S. 717, and Beck v. Washington, supra.

Counsel for appellant, in a careful and comprehensive brief in support of their claims of prejudice from publicity, have referred us to many cases and legal writings pertaining to the continuing conflict between the concepts of a free press and the individual's right to a fair and impartial trial by jury. In general the factual background of such cases may be roughly categorized in three groups or combi-

nations of groups: those in which actual exposure to prejudicial publicity occurred as in *Marshall;* those in which procedural safeguards were denied to the appellant as in Irvin v. Dowd, supra, and Janko v. United States, 366 U.S. 716; and those in which the outcome of a trial was poisoned[2] by accompanying incidental publicity as in Estes v. Texas, 381 U.S. 532, and the publicity inspired trial in Sheppard v. Maxwell, — U.S. —, decided June 6, 1966.

We find no compulsion in any of the cited cases indicating an actual or inherent unfairness in appellant's trial. The record in no way reveals that the trial was held at a time or place containing an excited populace and we find no error in the refusal of the trial court, after transfer of the case to Muskogee, to grant a continuance. Nor do we deem the trial court's refusal to hear in chambers the government's proffer of the testimony of Corn or Carroll to be an abuse of discretion. The traditional rule was followed, Rule 26, Fed. R. Crim. P. The speculation of the jurors, while excused, as to the reason for their exclusion, was just what the term implies and nothing more. It would have occurred regardless of whether the trial court considered the government's proffer in open court or in chambers. We conclude that appellant was denied no procedural safeguard either requested or incumbent upon the trial judge to accord him regardless of request.

Nor do we find any persuasive comparison between the case at bar and the decision in *Estes* or the factual background in *Sheppard.* In contrast to *Estes,* the trial court was in complete control of the trial and conducted it throughout in an atmosphere unmarked by diversion. The attendant publicity, both before and during the trial, was factual reporting, extensive but not "poisoned" by a self-appointed vindictive or crusading news media. Appellant's

---

[2] Indicated by Mr. Justice Frankfurter to have occurred in *Janko.* See concurring opinion, Irvin v. Dowd, at 730.

conviction was in no way inspired by or the result of trial by newspaper as is claimed in *Sheppard*.

Appellant also places argumentative emphasis upon the claim that government fed fuel to the newspapers by allowing the grand jury to indict appellant and Corn at the same time and by calling Corn as a witness after receiving information that Corn would demand the shelter of the Fifth Amendment; and appellant concludes that the jury verdict, returned in one hour and forty-eight minutes after a two-week trial, is indicative of deep rooted, extraneous prejudice flowing from the overall publicity. We can place no legal significance upon the argument for we know of no rule prohibiting simultaneous indictments nor requiring the acceptance of a claim to personal constitutional privilege before it is asserted and screened outside the jury's hearing, cf. Namet v. United States, 373 U.S. 179; neither can we give credence to appellant's conclusion of prejudice from the time of the jury's deliberation under the circumstances of this case.

In sum, we conclude that appellant both could have and did have a trial not violative of his rights through publicity.

As we have earlier indicated, it was incumbent upon the government, under its theory of accounting proof, to establish an opening net worth for appellant as a premise for its proof of guilt during the taxable years of the indictment charge. Claim is made that the trial court erred in admitting evidence, presented in support of the government's burden, concerning the circumstances surrounding the purchase of a home in 1953 in the name of Mr. and Mrs. Taylor, sister and brother-in-law of the then Mrs. Ruby Myers. Judge Welch married Mrs. Myers in 1959 and was married to Mrs. Fern Welch in 1953. The government contended that Judge Welch furnished the sum of $7,698.45 for the purchase of the home in 1953 and thus lessened his

cash assets by such amount. The government's evidence may be stated in conclusionary outline as follows: That appellant was well acquainted with and frequently visited with Mrs. Myers and the Taylors at least as early as 1947; that in 1949 he stated that he was negotiating for a house on North Robinson between 25th and 26th for a lady acquaintance to live in; that he inspected the subject house (2620 North Robinson) prior to its purchase and was present at the closing of the sale and vouched for Taylor's qualification for a loan; that neither Mrs. Myers nor the Taylors had assets nor income with which to buy the house; that Mrs. Myers lived in the home alone from 1956; that in 1955 the Taylors quitclaimed the home to Mrs. Myers without consideration; that Judge Welch married Mrs. Myers on June 27, 1959 and moved into the home; that the quitclaim deed was recorded in August of that year; that the property was sold in 1962 and the Taylors received nothing from the proceeds; that the Taylors made the original purchase payments by checks drawn upon accounts to which anticipatory deposits had been made; that Judge Welch made substantial withdrawals from his savings accounts at such time.[3]

Appellant does not directly attack the admission of this evidence as immaterial to the issues nor as insufficient in circumstance to support an inference that such an expenditure was made. Rather, appellant asserts that the matter was over-emphasized by the prosecution, unnecessary for the case, and permeated the trial with innuendo of immorality, even adultery, entirely independent of a charge of tax evasion. Such argument probes the relevancy of the evidence and its admission into evidence is a matter largely within the discretion of the trial judge in his performance of the duty of directing the trial to the issues of the crime charged. The basic rules of law in such regard

[3] Other evidence showed that Judge Welch, on the date the purchase was closed, purchased $6,000 in cashier's checks that were not cashed until nearly a year later.

are well established. Evidence of the commission of crimes not charged, as such, is not admissible; evidence of unlawful conduct, material to the crime charged, should not be admitted if its admission diverts the case into a "trial within a trial" and in actuality exposes the defendant to a conviction for a crime not charged, see United States v. Klein, 131 F. Supp. 807; but evidence tending to prove a material fact although incidentally showing the defendant to have committed another crime, or, as here, perhaps to indicate unconventional conduct, is not inadmissible because of a potential side effect. Ayash v. United States, 10 Cir., 352 F2 1009; O'Dell v. United States, 10 Cir., 251 F2 704. Judge Welch has been married three times and his expenditures in support of his marital experiences were necessarily a focal point in the government's case. The trial court did not abuse its discretion in allowing the government to prove the circumstances of the subject purchase of the home. And while we might agree with appellant that the evidence of the government was sufficient to warrant conviction even without the proof of the incident complained of, we know of no rule that requires the government to limits its presentation to a minimum case simply to avoid a sensitive area of proof.

Appellant asserts that the trial court erred in refusing to provide him copies of appellant's and the government witness Kaszubowski's testimony before the grand jury. Judge Welch appeared voluntarily before the grand jury, testified at length, but did not testify in the case at bar. Kaszubowski testified both before the grand jury and in the case. *However, this witness' testimony before the grand jury, except for some preliminary questions establishing identification, was not recorded.* And although it is now clear that the need for grand jury testimony as a useful tool of defense is, in most instances, a matter for determination by counsel and not the court, Dennis v. United States, — U.S. —, decided June 20, 1966, the instant case seems to present a clear exception to the rule announced in *Dennis*.

The government here did not have exclusive access to "a storehouse of relevant fact" in the grand jury proceedings. Judge Welch's own testimony would have served the defense no purpose as he did not testify at trial. The witness Kaszubowski's grand jury testimony did not exist in recorded detail except as we have indicated. The trial court did not invade the province of the advocate in refusing to produce it as a tool of defense utility.

Appellant also claims that he was denied a fair trial because a juror, asked upon voir dire if he had had any near relatives who had been involved in litigation that had been reviewed by the Supreme Court of Oklahoma, did not disclose that his father had been disbarred in 1935 by an order of that court. We find no merit to the contention of existence of prejudice. The incident of disbarment 29 years before did not carry inherent prejudice as a matter of law nor can it be classified as a deliberate nondisclosure of an activity contained within the term "litigation." The trial court did not abuse his discretion in refusing a new trial in this regard. Brown v. United States, 10 Cir., 356 F2 230.

Finally, appellant contends that he has been subjected to an excessive sentence in view of the fact that the same judge imposed a lighter sentence upon Judge Corn. Appellant subjectively concludes that he has been penalized for standing trial. Nothing in the record supports such a conclusion. To the contrary, significant differences in the age and health of the two offenders are immediately apparent and many other proper factors may have influenced the trial court's judgment. Since the sentence is well within the statutory limit this court will not interfere with the sensitive exercise of the trial court's discretion absent most unusual circumstances, none of which are here present. Jones v. United States, 10 Cir., 323 F2 864; Hayes v. United States, 10 Cir., 238 F2 318, cert. denied, 353 U.S. 983.

AFFIRMED.

ORDER DENYING PETITION FOR REHEARING EN BANC

Eighteenth Day, July Term, Tuesday, August 9th, 1966.

Before Honorable David T. Lewis, Honorable Jean S. Breitenstein, Honorable Delmas G. Hill, Honorable Oliver Seth and Honorable John J. Hickey, Circuit Judges.

This cause came on to be heard on the petition of appellant for a rehearing en banc and was submitted to the court.

On consideration thereof, it is ordered by the court that the said petition be and the same is hereby denied.

ORDER DENYING PETITION FOR REHEARING

Eighteenth Day, July Term, Tuesday, August 9th, 1966.

Before Honorable David T. Lewis and Honorable Jean S. Breitenstein, Circuit Judges, and Honorable Arthur J. Stanley, District Judge.

This cause came on to be heard on the petition of appellant for a rehearing herein and was submitted to the court.

On consideration whereof, it is ordered by the court that the said petition be and the same is hereby denied.

"EXHIBIT 5"

STATE OF OKLAHOMA)
) SS.
COUNTY OF OKMULGEE)

I, Freddie Lawrence Crawford, being duly sworn upon oath state: That I am a resident of Okmulgee County, Oklahoma, residing at 501 East 21st Street, Okmulgee, Okla-

homa. That I was an alternate juror in the United States District Court for the Eastern District of Oklahoma, and served as an alternate juror during the trial of Justice Earl Welch. That during the course of said trial and upon at least two occasions, the jury was removed from the court room for some purpose unknown to the jurors. That while the jury was removed there was considerable speculation by the jurors as to who was present in the court room during the juries absence, and it was speculated and thought by the jurors on one occasion, that it might have been Hugh Carroll or Earl Welch's wife, and on another occasion, it could have been Justice Corn. On one occasion the question was asked of the Bailiff, the Deputy Marshall or a member of the jury, who was testifying in the other court room, or the reason for our dismissal; and the answer was given by someone, that they were more than certain that Justice Corn or Welch's wife was testifying in the Welch Case. The response to the afore mentioned question could have been given by the Bailiff, the Deputy Marshal or a Juror, I do not recall; however, the statement was made before me in the presence of at least six or eight other jurors. Further affiant saith not:

/s/ FREDDIE L. CRAWFORD
FREDDIE LAWRENCE CRAWFORD

Subscribed and sworn to before me, this 10 day of November, 1964.

/s/ MARTHA MELROY
Notary Public

My commission expires 10-25-65

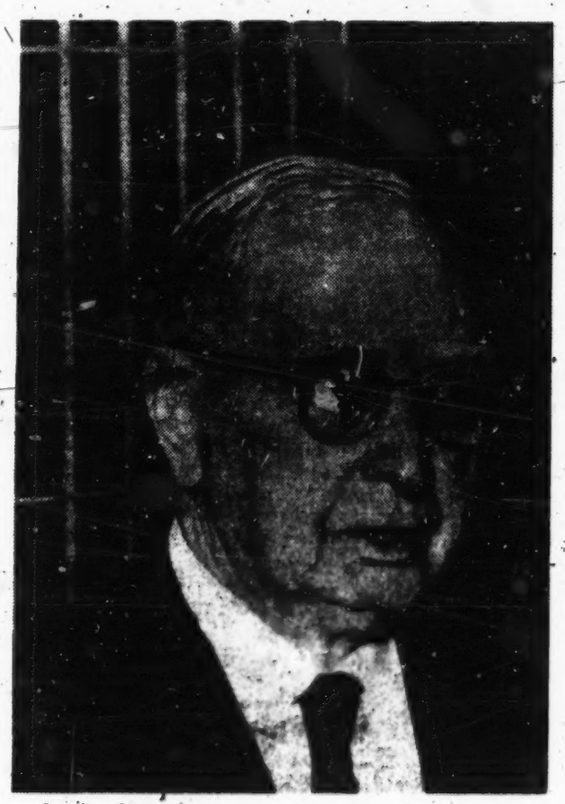
Circulation 315,702 A.M. P.M. Daily Average, March 1964

OKLAHOMA CITY TIMES

VOL. LXXV, NO. 46 — 54 PAGES—500 N BROADWAY, OKLAHOMA CITY, THURSDAY, APRIL 9, 1964 — FINAL HOME — FIVE CENTS

Pair Noncommittal, Calm

Two Justices Post Bond On Tax Evasion Charges



Welch and Corn Put Up $5,000; State Probe Due

Noncommittal and outwardly calm, two state supreme court judges made bond Thursday on federal income tax evasion indictments.

Justice Earl Welch avoided most newsmen and photographers by walking into U. S. Commissioner William C. Page's office about 8 a.m. to sign a $5,000 appearance bond and then going into the county jail to be photographed and fingerprinted.

He was not scheduled to appear until 10 a.m. Supernumerary judge N. S. Corn came in at the scheduled hour and ran into reporters and photographers waiting at the commissioner's office.

The two men were indicted on five counts each by federal grand jury late Wednesday. Welch, 72, is accused of evading federal income taxes from 1957-1961. Corn, 80, is charged with evading taxes from 1957-1959, and making an untrue tax return for 1958 and 1959.

The two judges had little comment to newsmen as they went through the formality of making a record for federal authorities. This included, besides signing their bonds, being booked at the [illegible]

Weather
Cloudy, Warmer
High 78, Low 47
Map, Page 22.

THE DAILY OKLAHOMAN

315,702
Morning and Evening
Average Daily March
Circulation

VOL. 73, NO. 96 — FORTY-TWO PAGES — 500 N BROADWAY, OKLAHOMA CITY, FRIDAY, APRIL 10, 1964 — FIVE CENTS

Judges Earl Welch, left, and N. S. Corn appear before U. S. commissioner Thursday to answer charges of tax evasion returned by grand jury.

Justice Welch Denies Guilt, Asks Early Trial

Judge Welch also said he [illegible] Judge Welch was indicted [illegible] federal income

s. 21

Circulation 396,189 A.M. P.M. Daily Average, June 1964

OKLAHOMA CITY TIMES

ENTIRE CONTENTS COPYRIGHTED 1964 OKLAHOMA PUBLISHING CO.

VOL. LXXV, NO. 117 | 44 PAGES—500 N BROADWAY, OKLAHOMA CITY, WEDNESDAY, JULY 1, 1964 | FINAL HOME | FIVE CENTS

CORN GETS 18 MONTHS; COURT PAYOFF CHARGED

Judge Seeks To Duck Rap; Health Cited

Nelson S. Corn, 80-year-old retired justice of the state supreme court, was sentenced Wednesday to 18 months in federal prison and fined $11,250 for income tax evasion.

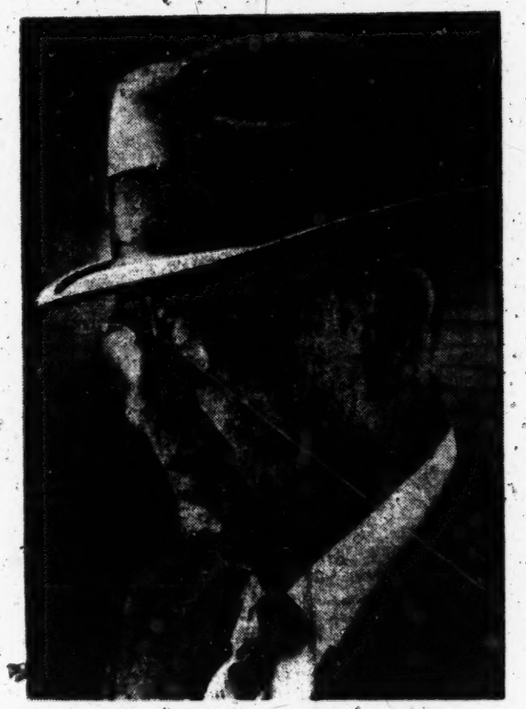
The sentence was imposed by U. S. District Judge Roy W. Harper, St. Louis, shortly after the supernumerary judge changed a previous plea of innocent to one of "no defense" to a 5-count grand jury indictment.

Judge Harper gave Corn until July 29 to present valid medical evidence that he is physically unable to serve time in prison.

Judge Free on Bond

In the meantime, he was allowed to remain free on bond.

Tall, somewhat stooped and hard of hearing, the retired veteran of 24 years' service on the high



Judge N. S. Corn . . . Prison ahead?

$150,000 Paid To Justice, U. S. Claims

By Leonard Jackson

The federal government accused retired Justice N. S. Corn and "others" on the state supreme court Wednesday of taking $150,000 in return for a favorable ruling in a pending case.

The bombshell dropped by U. S. Attorney B. Andrew Potter came shortly before Corn was sentenced to 18 months in prison and fined $11,250 on a five-count income tax evasion indictment.

Potter charged the government has evidence that $150,000, most of it in $100 bills, was paid to Corn after the supreme court reversed a lower court decision in the case in 1957.

$33,000 Returned, Potter Says

He charged that Corn told a "witness" the money would go to help himself and others of the supreme court in meeting "campaign expenses."

s. 23

Circulation 306,189 A.M. P.M. Daily Average, June 1964

OKLAHOMA CITY TIMES

ENTIRE CONTENTS COPYRIGHTED 1964 OKLAHOMA PUBLISHING CO.

VOL. LXXV, NO. 117 44 PAGES—500 N BROADWAY, OKLAHOMA CITY, WEDNESDAY, JULY 1, 1964 HOME FIVE CENTS

COURT BRIBE CHARGED; CORN GETS 18 MONTHS

Supreme Court Bribe Charged

(Continued from Page 1)

false returns for 1958 and 1959.

Welch is accused of evading $13,364 in taxes for 1957 through 1961. He pleaded innocent and his case has since been transferred to the eastern district at Muskogee.

Appeal Made

Before Harper sentenced Corn, the retired justice's attorney appealed to the court to temper justice with mercy.

He said that, because of Corn's advanced age and poor health, imprisonment might be fatal to him.

During the proceedings the tall, somewhat stooped retired justice sat in a chair near the bench. He is hard of hearing.

Potter said Corn's net worth, plus undeductible expenditures from 1957 through 1959 totaled about $75,000. But, he said, Corn reported taxable income of only about $25,000 for this period.

The district attorney said Corn told investigating Internal Revenue Service agents most of the unreported income resulted from horse race winnings and winnings at poker games.

Evidence Claimed

But Potter said the government had both oral and documentary evidence, if the case had gone to trial, to prove another source of the net worth increases resulting in unreported income.

He said the testimony would show that in 1956 the "witness" told Corn that, unless the court reversed a lower court's decision in the pending case, the corporation the "witness" controlled would suffer a tremendous loss.

Potter said Corn asked the "witness" how much it was worth to him for the favorable decision.

'Worth $150,000'

" . . . The witness told the defendant it was worth $150,000 to which defendant replied that he felt something might be worked out," Potter related.

He pointed out the supreme court reversed the lower court decision in 1957, whereupon the "witness" paid $150,000, most of it in $100 bills, to Corn.

Corn indicated to the "witness" that the $150,000 would go to help himself and "other members of the supreme court in meeting campaign expenses," Potter charged.

Judge N. S. Corn

Justice Also Fined $11,000; 'Others' Cited

By Leonard Jackson

Government attorneys charged Wednesday that Supernumerary Judge N. S. Corn and "others" on the state supreme court received $150,000 in return for a favorable ruling in a pending case.

Shortly after disclosure that the government's charge was the basis of a federal income tax evasion indictment

s. 25

TULSA WORLD

NATIONAL AND GENERAL NEWS

TULSA, OKLAHOMA, SUNDAY, OCTOBER 4, 1964 — SECTION 1—PART 2

Indictment Rocked Supreme Court

Justice Welch Trial Starts Monday

By BOB HARING

MUSKOGEE (AP)—Supreme Court Justice Earl Welch, whose indictment shook the state's highest civil court, goes on trial here Monday on federal income tax evasion charges.

The 72-year-old judge, a member of the state Supreme Court since 1933 who has twice served as chief justice, is accused of evading $11,063 in federal income taxes for 1957 through 1960.

Indictment of Welch and a semi-retired justice, 80-year-old N. S. Corn, last April rocked the state's legal ranks. They were further shaken when a federal attorney alleged that a $150,000 payoff had been made to a member of the court.

The Oklahoma Bar Association named a committee to investigate allegations about the court. This group was granted subpoena powers to call witnesses.

Gov. Henry Bellmon named a separate committee to look into the court.

Other justices asked full investigations to root out any wrongdoing and clear other judges of any hint of taint.

Corn pleaded no contest July 1 to six counts of income tax evasion, and then was sentenced to 18 months in a federal reformatory. He began his term after a physical examination to determine that imprisonment would not adversely affect his health.

Welch has denied the tax indictments and has accused the government of making a "calculated guess" of his income.

The government contends Welch understated his income on tax returns for four years.

The payoff allegations first came up at a hearing in Oklahoma City for Corn. U.S. Atty. B. Andrew Potter said the government had a witness who could testify to a $150,000 payoff to Corn in a case which had come before the Supreme Court.

The next day, in a hearing here on a motion by Welch seeking access to some more information on the charges against him, Welch's attorney said he knew of no person this could be but Hugh Carroll, one-time head of Selected Investments Corp., a $36 million operation before it went bankrupt in the 1950s.

Carroll served two years on federal fraud charges in the Selected Investments case.

Welch earlier had mentioned Selected Investments, objecting to what he termed apparent efforts to link him to that case.

Welch, chief justice when a tax case involving Selected Investments came before the Supreme Court, wrote an opinion which ruled Selected Investment income was not of the management corporation but of a trust and therefore not subject to state income tax.

In a statement after his indictment, Welch said, "that opinion and decision was sound and right and just when it was written and adopted by the court—as it is now—on the legal point involved and there decided."

Welch has long been prominent in state legal circles. He began practicing law in Antlers in 1911 and was elected a state District Court judge in 1926. He won election to the Supreme Court in 1933. He also has been active in Indian affairs and, as a member of the Chickasaw Nation, he served as president of the Inter-tribal Council of the Five Civilized Tribes.

His trial was moved here at his request.

Presiding will be Judge Roy Harper of St. Louis, who presided over the grand jury which indicted the judges.

Welch appeared voluntarily before the jury, spending a total of about six hours with the jurors.

Ref 4

JUSTICE ACCUSED

Welch's Trial Starts Monday

Oklahoma City Daily Oklahoman
10-4-64

By Katherine Hatch

At 9:30 a.m. Monday, a bailiff will call to order the federal court in Muskogee and U. S. District Judge Roy W. Harper, assigned from his regular court in St. Louis, will open the trial of the United States of America versus Earl Welch.

What follows will be the trial of Justice Earl Welch of the Oklahoma Supreme Court accused on five counts of evading $13,364 in federal income taxes.

Handling the government prosecution will be Willard McBride and Don Hanson, special assistants in the U. S. attorney general's office, Washington, D. C.

For Justice Welch will be his attorney, V. P. Crowe, Oklahoma City, and Crowe's partners and law firm associates.

Although names of subpenaed witnesses have not been disclosed, it was learned that witnesses have been called from throughout the U. S.

Their names have not been made public on specific orders of Judge Harper, to avoid the possibility of intimidation of witnesses prior to the trial, it was learned.

The same Oklahoma City federal grand jury that indicted Justice Welch on April 8 also indicted supernumerary Judge — and former supreme court justice — N. S. Corn.

Judge Corn, cited on three counts of evading $11,063 in federal taxes and two counts of knowingly filing false tax returns, first pleaded innocent to the indictment.

HE later changed his plea to no defense and was sentenced July 1 by Judge Harper to an 18-month prison term and an $11,250 fine.

On July 29, he entered the federal prison hospital at Springfield, Mo., to begin serving his sentence.

Judge Corn is expected to testify at the trial of Justice Welch, appearing either on a subpena — if he is released from prison soon — or on a writ to have him taken to Muskogee from the institution at Springfield.

Justice Welch pleaded innocent of the charges at his arraignment before Judge Harper, thus setting the stage for Monday's trial.

Perhaps the most intriguing facet of the coming trial and of the whole case the government purportedly has against Justice Welch became public at the time Jduge Corn was sentenced.

Asked by Judge Harper if the government had anything to say before sentence was passed, U.S. Attorney B. Andrew Potter, Oklahoma City, read a prepared statement.

After outlining the facts of the indictment, Potter said:

"There is also available oral and documentary evidence if the case had preceded to trial to prove another source of the net worth increases resulting in unreported income.

"The oral testimony would show that in 1956 the (unnamed) witness, who was interested in a case pending before the Oklahoma Supreme Court, told the defendant (Corn) that unless the court reversed a lower court's decision, the corporation which the witness controlled would suffer a tremendous loss; that the defendant (Corn) asked the witness how much it was worth to him for the favorable decision;

"That the witness told the defendant it was worth $150,000 to which the defendant replied that he felt something might be worked out.

"The supreme court reversed the lower court's decision in 1957, whereupon the witness paid $150,000, most of which was in $100 bills, to the defendant.

"The defendant (Corn) indicated to the witness that the $150,000 would go to assist himself and other members of the supreme court in meeting campaign expenses," Potter said.

It was this last sentence that caused the stir and led to investigations by the Oklahoma County attorney, the state Bar Association, and Gov. Bellmon into activities of the supreme court.

Both Justice Welch and Judge Corn were on the high court in 1957, and both were indicted by the same federal grand jury after three days of hearing witnesses.

Witnesses before that grand jury included Justice Welch, his former wife and a sister-in-law; O. A. Cargill, Oklahoma City attorney; and Hugh Carroll, founder and president of the old Selected Investments Corp., which had a lower court's unfavorable ruling reversed by the state supreme court in 1957.

S. 27

(5)

6

s. 29

Muskogee Daily Phoenix

VOL. LXIII—NO. 243 Muskogee, Oklahoma, Friday Morning, October 9, 1964 FOURTEEN PAGES

N. S. Corn May Be Witness In Welch Trial

By TOM ROOT
Phoenix Staff Writer

N. S. Corn, formerly a member of the Oklahoma Supreme Court, was expected Thursday to be brought to Muskogee from the United States Medical Center for federal prisoners at Springfield, Missouri, Friday as a witness in the income tax evasion trial of Justice Earl Welch of the Supreme Court.

Corn is serving an 18-month sentence imposed last May on his plea of nolo contendere to an indictment charging income tax evasion.

He was indicted by a grand jury which also indicted Justice Welch at Oklahoma City.

United States Attorney Andrew Taylor of the Western Oklahoma Judicial District said at the time of Corn's sentencing he had a witness who indicated Corn accepted $150,000, as a campaign fund for himself and others to influence a decision of the court.

Welch repeatedly has denied any of the money Corn was alleged to have taken came to him.

Corn's case, he said, had no connection with his (Welch's) case.

Whether Corn would testify Friday was not learned.

The government settled down for a time Thursday to the slow grind of backing its charges that Justice Welch had more money than he is alleged to have said he had at one time and too little at another.

The judge, on trial in Federal Court here since Monday morning, is charged with reporting $40,000 less taxable income than he had in the years 1957 through 1961.

Don Hansen of the tax division of the Justice Department told a jury Tuesday that Welch told Treasury agents some of the income he was alleged to have omitted really was drawn from $53,000 he took with him from Antlers to Oklahoma City in 1933 when he joined the Supreme Court.

The government put several witnesses on the stand to show bills he paid, or was alleged to have paid for water, gas and electricity at Oklahoma City and a $90.24 bill Welch paid December 7, 1960 for a golden coat, presumably for his wife. Cooper H. Marker, formerly of a Berkley, California clothing company, testified as to the coat. L. H. Hammond, recorder of Bedouin Temple here, testified Welch paid $15 annual dues at the temple between 1953 and 1958. Hal Pimsler, treasurer of the Tulsa Press Club, identified Welch's canceled checks for dues beginning January 20, 1953.

A series of payments, totaling $3,867, made with $100 bills and checks at an Oklahoma City dress shop on an account of Mrs. Ruby Myers Welch, was a departure from routine. The bills, on Mrs. Welch's account, were paid, Mary Lee Hartman, credit manager of the shop, said, by Mrs. Ophia Taylor between August, 1959 and December, 1961. Mrs. Taylor is Mrs. Welch's sister.

See the World Series with RCA Victor Color Television Scoggins 114 North Main. —Adv.

No explanation was provided by Mrs. Hartman as to why Mrs. Taylor paid the dress shop for merchandise billed to her sister.

Mrs. Welch, formerly Mrs. Ruby Myers, Mrs. Taylor and W.S. Taylor, her husband who died in 1954, negotiated purchase of a house at 2630 North Robinson, Oklahoma City, in 1953. Williams J. Strawbridge, Oklahoma City, who sold the house, testified Welch vouched for Taylor in the office of an Oklahoma City finance company which provided a loan of $6,520 for the purchase.

Mrs. Myers and Welch were married at Las Vegas, Nevada in June 1957. Mrs. Fern Welch whom he married in 1917 divorced him in 1957.

Hansen was prevented by an objection of V. P. Crowe, Oklahoma City, Welch's chief counsel, from introducing records of the Internal Revenue Service Thursday morning, which Hansen said the government offered to show Welch really owned the North Robinson street home in which the Taylors and Mrs. Ruby Welch lived in Oklahoma City.

The records showed that neither Mrs. Welch, then Mrs. Myers, nor

(Please see WELCH on page 3)

N. S. CORN
. . . May testify Friday in Welch case

s. 31

MUSKOGEE TIMES-DEMOCRAT

ASSOCIATED PRESS—ASSOCIATED PRESS FEATURES—N. E. A. SERVICE

VOL. NO. LXIX—NO. 243 Muskogee, Okla., Friday Evening, October 9, 1964

Corn Brought Here To Testify In Welch Case

N. S. Corn, former member of the Oklahoma Supreme Court, was brought to Muskogee from the Medical Center for Federal Prisoners at Springfield, Missouri, Friday as a witness in the income tax evasion trial in Federal Court of Supreme Court Justice Earl Welch.

Corn was sentenced to 18 months and fined in Federal Court at Oklahoma City last May on an income tax fraud indictment, returned by a Grand Jury at Oklahoma City, which also indicted Welch.

United States Attorney Andrew Potter of Oklahoma City said at the time of Corn's sentencing that he had a witness who indicated he would say Corn was paid $150,000 as campaign expenses for himself and others, to influence a pending decision of the Supreme Court.

Corn was expected to testify in Welch's trial Friday afternoon.

Ledger sheets of banks and savings and loan associations, checks and other records, the dry bones of Welch's income tax evasion case, were dumped into records of Welch's trial here Friday morning.

They showed deposits ranging from $1 and some cents to $10,000 and $15,000 in a dozen or so depositories, and investments in stocks and bonds. Most of the ledger sheets were from depositors in Oklahoma City. Some were from Antlers, Welch's home town, and a small account was shown to have been a few dollars in a Ponca City bank at one time.

The government introduced a document, amid the heap of papers, to show that Welch's salary as a district judge at Antlers from 1927 until his election in 1932 to the State Supreme Court was $4,000 a year, and that his current salary was $16,500 a year as a supreme court justice.

When Welch became a member of the Supreme Court his salary was $7,500 a year. It gradually was raised in the intervening years.

His total salary, as state district judge and justice of the State Supreme Court, the government's exhibit showed, was $300,162.62 through 1961.

The income tax charges are for the years 1957-1961. The government alleges he illegally failed to report about $40,000 of taxable income in making his returns for these years and short-changed the government of $13,000-plus of income taxes.

The government obviously introduced evidence of his salary as a district judge in its effort to dis-

(Please see WELCH on Page 3)

WELCH

(Continued from Page One)

prove a statement Internal Revenue agents attributed to Welch as an explanation of his returns that he took $53,000 with him to Oklahoma City, when he became an associate justice of the Supreme Court.

Some of the depositories in which Welch was shown to have accounts in the early 1950s and early 1960s were the First National Bank and Trust Company, Oklahoma City; an Antlers bank, Central State Bank of Oklahoma City, First State Bank, Oklahoma City; Mutual Savings and Loan Association, Oklahoma City; Oklahoma City Savings and Loan Association, Security Federal Savings and Loan Association, Oklahoma City, and the Local Federal Savings and Loan Association, Oklahoma City.

Records of his bonds of United States Savings Bonds between 1952 and 1961 totaled $15,000. His stock purchases between 1952 and 1961 totaled $20,000.

The records included a ledger sheet of the Skirvin Hotel, Oklahoma City, where Welch lived March 15, 1958, until July, 1959, and a check of $150 for Kentucky Derby tickets in 1960.

Clear to partly cloudy Saturday through Sunday. A little warmer Saturday and Saturday night and east portion Sunday. High Saturday 69 extreme east to 82 west.

Muskogee Daily Phoenix

Final Home Edition

Price 5c

VOL. LXIII—NO. 244 Muskogee, Oklahoma, Saturday Morning, October 10, 1964 TEN PAGES

Phoenix Staff Photo

N. S. CORN, 80-year-old former justice of the Oklahoma Supreme Court, mounted the steps of the Federal Building, supported by a deputy United States marshal and medical technician, Friday afternoon to "take the Fifth Amendment" in the trial of Justice Earl Welch, formerly an associate on the bench of Oklahoma's highest court. Deputy Marshal John D. Reid is on Corn's left. Harry Howard, medical technician of the United States Medical Center for Federal Prisoners, Springfield, Missouri, is shown on the right. Corn is serving an 18-month sentence in the medical center for evasion of federal income taxes.

Corn Takes The Fifth In Earl Welch Trial

WELCH

(Continued from Page One)

sum of money that year?"

"Did you receive any campaign funds that year, judge?"

"Did you have a large number of $100 bills that year?" Reference has been made in the trial to payment of bills of Mrs. Ruby Myers, later Mrs. Welch, with $100 bills.

"Have you ever had any financial transactions with Judge Welch?"

"Did you ever deliver any money to Judge Welch in 1957?"

"Did you receive a bribe in 1957?"

"Are you acquainted with a case of the Selected Investment Corporation against the Oklahoma Tax Commission?"

"If you were given assurance against state and federal prosecution, would your answers be the same?"

Corn was granted a request to confer with his attorney, before replying. Judge Harper granted the request.

Corn and his attorney left the court room for the conference, and, after a while, returned to the witness stand. Corn's sons Lonnie Corn and Burton Corn of Bartlesville participated in the conference.

Hansen repeated his question and Corn replied by again taking protection of the Fifth Amendment.

"Do you know of any money Judge Welch received in addition to his salary in 1957?" Hansen asked.

Corn again claimed the Fifth Amendment.

"I think it would be futile to question this witness any further, your honor," Hansen said.

The former jurist stepped down and out of the court room.

"I don't know if the state could grant immunity," Fowler said afterward.

"I understand there'll be a jury after the election," he added.

The jury returned to the box to hear testimony of Lee Welch, Antlers, one of Judge Welch's brothers, and of Judge Welch's son, Byron Welch of Washington, D.C.

Lee Welch was questioned as to photostats of checks he identified as having been given to him by his brother in the years 1956 through 1960. They were for small sums—$10, $25 and $50—which Lee Welch said he supposed his brother gave him to cash.

While Welch's son was on the stand, Judge Harper angrily protested "for a young lawyer, you have one of the worst memories, I ever encountered."

V. P. Crowe, Judge Welch's leading counsel, sprang to his feet.

"I move for a mistrial," he declared.

Judge Harper overruled the motion and then waved Crowe on to cross examining the younger Welch, the government having concluded its examination.

The judge's angry protest followed Byron Welch's identification of a series of generally for $50 or $75, he said he believed his father had sent him while he attended various schools, among them the University of Paris (France) as gifts and checks which he identified as a loan of $6,000 his father had provided for purchase of a house in Washington, D.C.

Ledger sheets of banks and savings and loan associations, checks and other records, the dry bones of Welch's income tax evasion case, were dumped into records of Welch's trial Friday morning.

They showed deposits ranging from $1 and some cents to $10,000 and $15,000 in a dozen or so depositories, and investments in stocks and bonds. Most of the ledger sheets were from depositors in Oklahoma City. Some were from Antlers, Welch's home town, and a small account was shown to have been a few dollars in a Ponca City bank at one time.

The government introduced a document, amid the heap of papers, to show that Welch's salary as a district judge at Antlers from 1927 until his election in 1932 to the State Supreme Court was $4,000 a year, and that his current salary was $16,500 a year as a supreme court justice.

When Welch became a member of the Supreme Court his salary was $7,500 a year. It gradually was raised in the intervening years.

His total salary, as state district judge and justice of the State Supreme Court, the government's exhibit showed, was $300,162.62 through 1961.

The income tax charges are for the years 1957-1961. The government alleges he illegally failed to report about $40,000 of taxable income in making his returns for these years and short-changed the government of $13,000-plus of income taxes.

The government obviously introduced evidence of his salary as a district judge in its effort to disprove a statement Internal Revenue agents attributed to Welch as an explanation of his returns that he took $53,000 with him to Oklahoma City, when he became an associate justice of the Supreme Court.

s. 35

Oct 10

Weather
Partly Cloudy, Warmer
High 89, low 43.
Details, Page 2

THE DAILY OKLAHOMAN

312,912
Morning and Evening
Average Daily September
Circulation

VOL. 73, NO. 279 | COPYRIGHT, 1964, OKLAHOMA PUBLISHING CO. 500 N BROADWAY, OKLAHOMA CITY, SATURDAY, OCTOBER 10, 1964 | THIRTY-TWO PAGES | FIVE CENTS

Corn Refuses to Answer Any Questions at Welch Trial

By Katherine Hatch
Staff Writer

MUSKOGEE — Repeatedly pleading the fifth amendment against self-incrimination, former state judge N. S. Corn refused Friday to answer any questions about Justice Earl Welch, on trial for federal income tax evasion.

Questions asked by government prosecutor Don Hansen concerned Corn's knowledge of Hugh Carroll and the Selected Investments Corp., whether he had delivered any money to Judge Welch in 1957, and if he received a bribe in 1957.

Even when offered immunity from state prosecution for any past offenses, the 80-year-old former supreme court justice and supernumerary judge declined to answer questions.

He took the fifth amendment 17 times.

The appearance of Corn — serving an 18-month sentence for tax evasion — highlighted the fifth day of the trial of Welch, 72, indicted on five counts of evading taxes from 1957 through 1961.

Byron Welch, a son of the judge, drew heated criticism from presiding U. S. District Judge Roy W. Harper, when he failed to positively identify certain checks given him by his father and which reportedly he had seen again prior to testifying Friday.

The criticism led V. P. Crowe, attorney for Justice Welch, to ask for a mistrial. His request was overruled.

Corn, accompanied by his attorney, Richard Fowler, and two sons, Lonnie and Burton Corn, both of Bartlesville, entered the courtroom about 2:15 p.m.

The jury of nine men and three women had been ordered out of the room by Judge Harper because it was thought Corn's testimony might be prejudicial.

Hansen first asked Corn how long he had been a judge of the state supreme court (1935 to 1959) and how long he was a supernumerary judge (1959 to resignation July 1, 1964). He asked if Corn were married and how many children he had (four).

"Do you know Judge Welch?" Hansen asked, and Corn said he did.

Corn's attorney, Fowler, told Judge Harper at that point that Corn wanted to "claim his privilege under the fifth amendment."

Judge Harper said he would have to claim the privilege to each question and he would have to do the claiming himself.

Corn then declared: "Let me state at this time, claiming my privilege under the fifth amendment on advice of counsel, I decline to answer the question for the reason the answer might tend to incriminate me."

To each of the following 17 questions, Corn claimed the same privilege.

After 14 questions, Hansen said, "If you were given

(Continued on Page 2, Column 1)

Corn Refuses to Answer Any Questions at Welch Trial

CONTINUED FROM PAGE ONE

immunity from prosecution by the state of Oklahoma for any past offenses would your answer be the same?"

Corn and Fowler called for a conference and, accompanied by Corn's sons, met 10 minutes in Judge Harper's chambers. No one else was present.

On their return to the courtroom, Hansen re-read his previous question.

"On advice of counsel, my answers would be the same," Corn said.

"Do you know of any money Judge Welch received in 1957 in addition to his salary?" Hanses said, and for the final time, Corn took the fifth amendment.

Hansen told Judge Harper he thought "it would be fruitless to question this witness any further." Corn was excused.

Byron Welch, an attorney, testified that from 1954 to 1957, while he was attending law school, his father sent him "some small amounts of money — I don't know how much."

Hansen showed him more than a dozen checks, including one for $375, another for $400, which Welch said was part of a $500 loan, and checks for $2,000 and $4,000 which Welch said was a $6,000 loan for a house. He was not positive in identifying the checks, telling Hansen he thought he had received them from his father or he believed he had.

Mrs. Ruby Myers Welch, whom justice Welch married in 1959, also was brought into the questioning of young Welch.

Welch said he thought he had met her before 1951, but he wasn't sure.

On cross-examination by Crowe, Welch said internal revenue agents had interviewed him three or four times prior to the trial, and that they had with them the checks presented Friday.

Judge Harper then castigated Welch claiming, "For somebody who's been shown those checks, you have one of the worst memories I've ever seen, and for a lawyer."

The presiding judge termed Byron Welch "a lawyer, a young man, and not the average witness . . . an officer of the court" in criticizing his testimony.

Crowe leaped to his feet, objecting to the statements of the court (Judge Harper) and asking for a mistrial.

In overruling Crowe's request, Judge Harper noted that Crowe brought out that Welch previously had seen the checks, not the government.

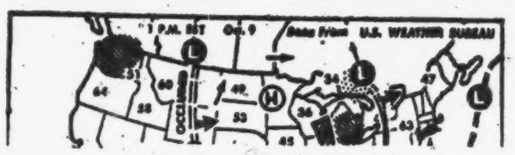
Lee Welch, Antlers, a brother of justice Welch, also identified checks from Earl Welch.

Internal revenue agents also testified to tax returns submitted by Welch in testimony Friday afternoon.

Earlier Friday, stock purchases amounting to more than $20,000 acquired by Welch from 1952 to 1961 were disclosed. Savings bonds from 1936 to 1961 accumulated to $16,425 in purchases, it also was declared by government attorneys.

Present in the courtroom during Corn's appearance was Oklahoma County attorney James Harrod.

Pair Arrested After Ketchum



Disease Fear In California

Death for Kidnaped

Man Shot Twice In Fight at Bar

MUSKOGEE TIMES-DEMOCRAT

ASSOCIATED PRESS—ASSOCIATED PRESS FEATURES—N. E. A. SERVICE

Edition
Price 5c

VOL. NO. LXIX—NO. 244 | Muskogee, Okla., Saturday Evening, October 10, 1964 | EIGHT PAGES TODAY

Corn Invokes Fifth Amendment 17 Times At Trial Here Of Fellow Supreme Court Justice

An elderly former Oklahoma Supreme Court Justice, brought here from a federal prison hospital to testify in the income tax evasion trial of fellow Justice Earl Welch refused Friday to answer questions.

The reluctant witness, N. S. Corn, now serving an 18 months term at the U.S. Medical Center at Springfield, Missouri, for income tax evasion, invoked the Fifth Amendment 17 times even though offered immunity from his testimony.

Corn, 80, answered the first question, replying only that he knew Welch.

Questions which drew no answer included, "Did you deliver any money to Judge Welch in 1957?" He also declined to reply to questions about whether he had received a large sum of money in 1957, whether he had a large number of $100 bills in 1957, whether he was acquainted with a state tax case involving now-bankrupt Selected Investments Corporation, and whether he knew Hugh Carroll, former head of Selected.

None of Corn's testimony was heard by a jury which since Tuesday morning has been hearing the government unfold its income tax case against Welch, his fellow jurist. The jury left the court room before his testimony and returned only after Corn was taken away, through a hall, to an elevator and down to a Muskogee motel where he was held for his return to the United States Medical Center in Springfield, Missouri, where he is serving an 18-month sentence for making fraudulent income tax returns.

U.S. Attorney Andrew Potter, Oklahoma City, said at the time Corn was sentenced there last May, he had a witness whom he gave the

(Please see WELCH on Page 3)

SILENT WITNESS—Former State Supreme Court Justice N. S. Corn leaves the elevator in the Federal Building here after invoking the Fifth Amendment 17 times as a witness at the trial of fellow Justice Earl Welch. Corn, now serving an 18-months sentence at the U.S. Medical Center at Springfield, Missouri, on a charge of income tax evasion, was brought here under guard and returned there Saturday. Behind Corn is Deputy Marshal John D. Reid. (Staff Photo.)

WELCH

(Continued from Page One)

name of Pierre Lavel, who would testify Corn was paid $150,000 in 1957, for campaign expenses for himself and others.

A decision on a state tax case in which the ill-fated Selected Investments Company was involved was in the State Supreme Court at the time. The court, of which Welch and eight other justices were members, ruled for the company, holding the company was exempt from paying a state income tax. The company later was declared bankrupt and its president Hugh Carroll was sentenced to five years for illegal manipulation of the company's funds.

The jury's removal was apparently in response to a motion of Welch's counsel to determine if Corn would plead the Fifth Amendment.

The government contends Welch had $40,000 of unreported income during 1957 through 1961, when he is accused of evading more than $13,000 in income taxes.

The jury returned to the box to hear testimony of Lee Welch, Antlers, one of Judge Welch's brothers, and of Judge Welch's son, Byron Welch of Washington, D.C.

Welch was taken to the motel under guard for the night. He was expected to be returned to Springfield Saturday morning.

While Welch's son was on the stand, Judge Harper angrily protested "for a young lawyer, you have one of the worst memories, I ever encountered."

V. P. Crowe, Judge Welch's leading counsel, sprang to his feet, "I move a mistrial," he declared.

Judge Harper overruled the motion and then waived Crowe on to cross-examining the younger Welch, the government having concluded its examination.

The judge's angry protest followed Byron Welch's identification of a series of checks, generally for $50 or $75, he said he believed his father had sent him while he attended various schools, among them the University of Paris (France) as gifts, and checks which he identified as a loan of $6,000 his father had provided for Byron Welch's purchase of a house in Washington in 1964.

World War I Vet

TULSA DAILY WORLD

L HOME EDITION — TULSA, OKLAHOMA, SATURDAY, OCTOBER 10, 1964 — 20 PAGES—2 P.

JUDGE CORN TAKES FIFTH REPEATEDLY

Former Colleague of Justice Welch Refuses to Testify

By GEORGE KANE
Of The World Staff

MUSKOGEE — N. S. Corn, former Oklahoma Supreme Court justice, now serving 18 months in a federal prison hospital at Springfield, Mo., refused Friday to testify against his former court colleague Judge Earl Welch, although federal prosecutors offered Corn both federal and state immunity.

Corn's 17 minutes on the stand consisted almost exclusively of his repeated refusal to answer questions, claiming privilege under the Fifth Amendment.

His appearance here Friday was the high point of five days of testimony in the federal income tax evasion trial of Judge Welch, who is accused of failing to declare $40,000 income, and non-payment of $13,384 in taxes, from 1957 through 1961.

Corn and Welch were indicted by the same Oklahoma County grand jury April 8, and at a July 1 hearing Corn pleaded no contest to income tax evasion. He was sentenced to prison with the term to be served at the U.S. Medical Center at Springfield.

Accompanied by Sons

The 80-year-old Corn was accompanied Friday by two of his sons, Lonnie and Burton Corn, both of Bartlesville, and his attorney, Richard Fowler, Oklahoma City.

It was on Fowlers' advice that the nearly deaf Corn pleaded the Fifth Amendment to 17 questions by Don Hansen, special assistant to the U.S. attorney general.

Hansen apparently was seeking a link between Judge Welch and Corn in 1957.

At Corn's hearing, before he was sentenced, U.S. District Atty. Andrew Potter told the court a witness had indicated to them he would testify to an alleged $150,000 bribe to Corn to influence a case which had come before the state Supreme Court.

Potter did not identify the witness, but said the witness indicated a portion of the money was to be used for campaign purposes of judges.

Welch's Son Testifies

Potter's statement touched off two separate investigations. Judge Welch's trial for tax evasion, however, has not been linked with Corn.

Slightly more than an hour after Corn testified, defense counsel V. P. Crowe moved for a mistrial on the basis of remarks made to a witness by U.S. District Court Judge Roy W. Harper, St. Louis, Mo., who is hearing the Welch case on special assignment.

The witness was Byron Welch, son of the man on trial.

Byron Welch was questioned in detail regarding canceled checks once sent to him by his father, made out to and endorsed by the son.

He testified he could not remember if checks shown him Friday were the checks he had been questioned about earlier by Internal Revenue Service agents. He said repeatedly the checks from his father could have been gifts or loans, but that his memory was hazy.

"You've got one of the worst memories I've ever seen for a lawyer," Welch was told by Harper.

Crowe immediately moved for a mistrial and Judge Harper

See WELCH on Page 7

WELCH

Continued from Page One

overruled the motion. Further testimony showed the checks were for portions of loans during the 1950s—one loan for $6,000 and another for $500.

Corn had been slated for an 11 a.m. court appearance, but that was delayed to give the ailing former justice time to rest. After his testimony he was allowed to remain in custody here overnight.

Corn was brought to the court room by U.S. Marshal John D. Reid and sworn to testify at 2:13 p.m. The jury of nine men, three women and two men alternates, was removed during his period on the witness stand.

Hansen asked Corn, "do you know Judge Welch?"

"Yes, sir," Corn replied.

"Just a minute, judge," Fowler said to Corn. Then Fowler told Judge Harper: "Your honor, this witness wishes to claim his privilege under the Fifth Amendment."

Takes Fifth Amendment

Fowler was told the witness alone could claim the privilege to each question.

The question, "Do you know Judge Welch," was read to Corn.

"Let me state at this time," Corn said, "claiming my privilege under the Fifth Amendment on advice of counsel, I decline to answer the question for the reason that the answer might tend to incriminate me."

With each question, Corn gave the same or a modified reply. Hansen asked: "How long have you known Judge Welch? Do you know Mrs. Ruby Welch, sir? Have you ever played cards with Judge Welch? Did you know Mrs. Fern Welch? Do you know any of Judge Welch's children? Do you know a man named Hugh Carroll?"

(Carroll, Oklahoma City, served two years in prison for the manipulation of finances of Selected Investments Corp., a multi-million dollar firm which went bankrupt in 1959.)

More Questions

Hansen asked further: "Directing your attention to the year, 1957, did you receive a large sum of money that year? Did you receive any campaign funds that year, judge? Did you have a large number of $100 bills in 1957? Have you ever had any financial transactions with Judge Welch? Did you delivery any money to Judge Welch in 1957? Did you receive a bribe in 1957? Are you acquainted with a case of Selected Investments Corp., against the Oklahoma Tax Commission? If you were given assurances against state and federal prosecution would your answers be the same?

At this point, an objection was made by the defense to the question. It was overruled.

Corn again claimed the Fifth Amendment, then asked Hansen: "That's just the criminal end of it, isn't it? There is a civil matter pending against me." He referred apparently to income tax assessments still in abeyance.

New Grand Jury Looms

Crowe interjected to point out the federal government cannot promise immunity from prosecution on a state charge. Fowler, who indicated after the close of Friday's testimony that a new Oklahoma County grand jury may be called after Nov. 13, said he did not know if immunity could be granted.

At the time of the objection, Fowler said the question by Hansen as stated didn't offer immunity but only asked about assurances.

"If you were given immunity from prosecution by the state of Oklahoma for any past offenses, would your answers be the same?" Hansen asked Corn.

Fowler, Corn, and Corn's two sons asked to confer on the matter returning from Judge Harper's chambers eight minutes later. Corn was again asked the question. He pleaded the Fifth Amendment.

"Do you know of any money Judge Welch received in 1957 in addition to his salary?" Hansen asked. Corn refused to answer.

Hansen turned to Judge Harper and said, "I think it would be fruitless to question this witness any further, your honor." Corn left the court room at 2:27 p.m.

s. 41

ship. From the left, they are the pilot, Cdr. [illegible]

Circulation 312,912 A.M. P.M. Daily Average, September 1964

OKLAHOMA CITY TIMES

ENTIRE CONTENTS COPYRIGHTED 1964 OKLAHOMA PUBLISHING CO.

VOL. LXXV, NO. 205 34 PAGES—500 N BROADWAY, OKLAHOMA CITY, MONDAY, OCTOBER 12, 1964 FINAL HOME FIVE CENTS

Carroll Airs $150,000 Payoff to Justice Corn

Hugh Carroll

Investment Chief's Testimony Barred From Welch Jury

By a Staff Writer

MUSKOGEE — Details of a $150,000 bribe to a former state supreme court justice were revealed Monday by Hugh Carroll, testifying at the federal income tax evasion trial of Justice Earl Welch.

Carroll, who headed the Selected Investments Corp., told of meeting with N. S. Corn, former high court justice and supernumerary judge, from 1956 through 1958.

His testimony came after the jury was ordered out of the courtroom during preliminary questioning

s. 43

DS Mrs Flavia Purfey
1243 So Atlanta Pl.
Tulsa, Okla. 74104

THE WEATHER

Partly cloudy to clear Tuesday through Wednesday. A few showers southeast and extreme east Tuesday and Tuesday night. A little warmer east portion Tuesday and most sections Wednesday. Highs Tuesday 65 to 74.

Muskogee Daily Phoenix

Final Home Edition
• • •
Price 5c

VOL. LXIII—NO. 246 | Muskogee, Oklahoma, Tuesday Morning, October 13, 1964 | TWELVE PAGES

Carroll Alleges $150,000 Payoff To Corn

By TOM ROOT
Phoenix Staff Writer

Hugh A. Carroll, who was president of Selected Investments Corporation when it collapsed in bankruptcy in 1958, testified in Oklahoma Supreme Court Justice Earl Welch's income tax evasion trial here Monday that he gave N. S. Corn, a supernumerary judge of the court $150,000 in 1957 to influence a decision of the court.

A case involving state income taxes of Selected Investments was before the court at the time. Corn said that, if the Supreme Court upheld ruling of the Oklahoma Tax Commission and a district court in the tax case, the management section of Selected Investments would be ruined by an assessment of $500,000.

Carroll's testimony as to the alleged payment to Corn was taken in the absence of a jury Monday.

Federal Judge Roy W. Harper ruled that it was not admissable in Welch's trial.

Carroll testified in a hearing to determine if the evidence was admissable.

Corn, in describing payment, he said he made to Corn, did not connect Welch with the payment. He said Corn, promising "an arrangement" for a decision favorable to the company, told him part of the money would go to "the boys" or to "others," but that he did not say any of it was to go to Welch.

The exclusion of Carroll's testimony was a second major blow for the defense.

The first came last Friday, when Corn, also a government witness, testified in a hearing, at which the Welch jury was not present, used the Fifth Amendment 17 times in avoiding questions as to his relations with Carroll and payment of money to Carroll.

Judge Harper also ruled for Welch that Corn's testimony, lack of it, was not admissable in Welch's trial.

The government plunged on Monday afternoon with the testimony of two special agents of the internal investigation section of the Internal Revenue Service to the effect that Welch, repeatedly called upon to account for "cash on hand" and other information to [illegible] income, stock holdings and other data, delayed doing so. The agents were William [illegible] and [illegible] Kaszubowski. They made the investigation which resulted in Welch's indictment. At this stage, Kaszubowski related that records of the First National Bank and Trust Company of Oklahoma City showed [illegible] entered the vault [illegible] his safety deposit box was kept. August 30, 1963, the day before an inventory of the box was ordered.

The box, among other things, contained four $100 bills, 15 $20 bills and $20 of bills in an envelope labeled pay for a speech he had made.

Finally, Kaszubowski said Welch was ordered to appear for an explanation of his financial operations September 25, 1963. The appearance was ordered by [illegible] O'Neil, supervisor of the Internal Revenue Service criminal division, the witness said. Welch, his brother Dan Welch, attorneys Bruce Johnson and V. P. Cleave and [illegible] P. Lynch, national coordinator of the Internal Revenue's criminal section, appeared, Kaszubowski said. Welch, he said, did not submit the required financial material.

The investigation continued, Kaszubowski said, turning up stocks Welch owned and had not mentioned.

In calling Corn and Carroll as government witnesses the government indicated the bribe money figured in Welch's income tax case.

Carroll has served a two-year sentence for manipulation of the finances of Selected Investments. The company was plunged into bankruptcy in 1957.

Corn is serving an 18-month sentence for income tax evasion.

Corn and Welch were indicted by a Federal Grand Jury at Oklahoma City last April. They were charged in separate indictments with making fraudulent income tax returns.

Garrol testified Monday he has known Corn since 1905, when Corn was a teacher in a small school at Putnam, Oklahoma.

He said he telephoned Corn in the Winter of 1956 after the Oklahoma Tax Commission and a district court had ruled against the elected Investments Corporation in its effort to escape payment of

(Please see WELCH on page 2)

MUSKOGEE TIMES-DEMOCRAT

ASSOCIATED PRESS—ASSOCIATED PRESS FEATURES—N. E. A. SERVICE

VOL. NO. LXIX—NO. 245 Muskogee, Okla., Monday Evening, October 12, 1964

Carroll's Testimony Of '$150,000 Gift' Ruled Out As Welch Evidence

Hugh A. Carroll, who was president of the ill-fated Selected Investments Corporation, testified in a hearing from which a jury was excluded in the tax evasion case of Supreme Court Justice Earl Welch here Monday, that he gave N. S. Corn, a supernumerary judge of the Oklahoma State Supreme Court, $150,000 in 1957 to influence a decision of the court.

Carroll's testimony, taken to determine if it would be admissable against Welch, promptly was declared by Federal Judge Roy W. Parker not to be admissable.

Carroll testified that in dealing with Corn Welch's name was not mentioned.

Corn "took" the Fifth Amendment Friday in response to 17 questions as to the alleged bribe. His testimony also was given out of the presence of the jury trying Welch's case.

Exclusion of Carroll's testimony was a blow to the government.

In calling Corn and Carroll as government witnesses the government indicated the bribe money figured in Welch's income tax case.

Carroll has served a two-year sentence for manipulation of the finances of Selected Investments. The company was plunged into bankruptcy in 1957.

Corn is serving an 18-month sentence for income tax evasion.

HUGH CARROLL

Corn and Welch were indicted by a Federal Grand Jury at Oklahoma City last April. They were charged in separate indictments with making fraudulent income tax returns.

Carrol testified Monday he had known Corn since 1905, when Corn was a teacher in a small school at Putnam, Oklahoma.

He said he telephoned Corn in the Winter of 1956 after the Oklahoma Tax Commission and a district court had ruled against the

(Please see WELCH on Page 2)

Cardinals Win Fifth Game 5-2

FINAL
★★★
HOME

The Tulsa Tribune

RAIN Courtown .....57 Airport 2 p.m. ...58

AREA FORECAST—Cloudy and cool with occasional light rain tonight, Tuesday partly cloudy and a little warmer. Low tonight in upper 40s. High Tuesday near 70. Complete weather, page 8.

VOLUME LXX—NUMBER 241 TULSA, OKLAHOMA, MONDAY, OCTOBER 12, 1964 34 PAGES—2 SECTION FIVE CENTS

Carroll Confirms Bribe; Not Admissible in Welch Case

HUGH CARROLL

By NOLEN BULLOCH
Of The Tribune Staff

MUSKOGEE—The fantastic story of a $150,000 bribe to a former justice of the state Supreme Court was told today but the judge ruled that the jury in the tax evasion trial of Justice Earl Welch could not consider it.

The story came from Hugh A. Carroll, the former president of Selected Investments, Inc., who testified he gave the $150,000 in $100 bills to former Justice N. S. Corn.

U.S. Dist. Judge Roy W. Harper of St. Louis, presiding at the Welch trial which went into its second week today, ruled that the sensational testimony was not admissible because Carroll testified that on no occasion had he ever discussed the payoff with Welch.

The government had sought to get the story before the jury as a clincher to show that this was the source of $40,000 or more that Welch is accused of not reporting on his income during the years 1957 through 1961.

CARROLL, IN HIS STINT ON the stand with the jury out of the courtroom, admitted the so-called Pierre Laval who cropped up during his own trial and in the bankruptcy proceedings of Selected Investments was a fictitious character improvised by Carroll himself.

The 78-year-old Carroll served two years in prison after he was convicted in federal court in 1959 for fraud and conspiracy growing out of dealings of Selected Investments.

At the outset of court today, Judge Harper sent the jury of nine men and three women into another courtroom across the corridor. He explained that the attorneys for Welch had demanded that Carroll be examined out of the hearing of the jury and that the government had agreed to the request.

Carroll then was called to the stand by Willard McBride, a special assistant to the attorney general.

AT THE OUTSET, CARROLL described the nature of Selected Investments Corp., relating that he was the president of the $38 million firm and that he held 85 per cent of the stock when it went into bankruptcy.

Q. Was this company involved in litigation in 1956 before the state Supreme Court?

A. It was involved in a tax matter which first arose with the Oklahoma Tax Commission, then in the District Court which ruled the company owed $500,000 in taxes.

Q. Do you know Judge Welch?

A. I have met him.

Q. Have you attended meetings with him?

A. I might have, but I don't recall any.

Q. Do you know Corn, Judge Corn?

A. I do.

Q. How long have you known him?

A. Since 1905.

AT THIS POINT, CARROLL related that he visited his stepfather and mother in Corn's home town when Carroll was a teacher at Putnam, Okla.

Carroll then related that in 1956 the Oklahoma County District Court ruled against Selected Investments.

Q. What did you do then?

A. I got in contact with Judge Corn and told him I would like to visit with him. He told me to come by his house that afternoon, which I did, and we had a conversation in my auto.

Q. Will you please relate the substance of the conversation?

A. I told him our case would be coming up in the Supreme Court and we wanted to get a favorable decision. He said what does this mean to you, and I said, about $150,000 because if the $500,000 tax is upheld it will wipe out our management company. He said it would take about $150,000 as he would have to take care of some of the other boys for their campaign expenses.

Q. Did he say he wanted any money down?

A. He said no, that not until after the court decision had been made.

Q. Did he enlarge on the conversation about the other boys?

A. No.

CARROLL THEN TESTIFIED that the decision was handed down in the middle of March 1957, and that on April 10 he talked to Corn. Corn said he wanted him to take care of part of the obligation, that he wanted $25,000. Carroll said he obtained $25,000 in $100 bills.

"He came by my office and I got in his car and gave him the $25,000," Carroll related.

Carroll then related that this April 10 date was the day before the mandate in the case was issued by Welch, who had written the opinion and who was then chief justice on the high bench.

The Welch decision in the Selected Investments case was concurred in by Corn, who was vice chief justice, Denver N. Davison, N. B. Johnson, W. A. Carlile and Ben T. Williams.

Two justices, W. H. Blackbird and Floyd L. Jackson, dissented, and a third, Harry L. Halley, did not participate.

In 1959 Corn was replaced on the court by Pat Irwin, and Carlile by William A. Berry. The others are still on the high bench.

Q. What was Corn's explanation for the payment of the $25,000 on April 10.

A. He requested it because he said the mandate would be delivered the next day. I talked with him again the latter part of April and arranged for the balance of the agreement. I went to First

See WELCH, page 8

CARROLL THEN DESCRIBED two other hearings, one a proceeding in bankruptcy of his company and the other his own criminal trial.

He then described how he had told the story of a man named Pierre Laval who had been given the $150,000.

Q. Who is Laval?

A. That was a fictitious story and name.

V. P. Crowe, chief defense attorney questioned Carroll only briefly, bringing out the points that at no time had he ever met with Welch or had any transactions with him.

McBRIDE THEN IN ARGUMENT to the court told Judge Harper, "Our purpose is to show possibly some of the net worth increase of Welch's income over the years 1957-61. There have been some increases that cannot be explained."

Judge Harper in his ruling said: "This presents a very serious matter. I am not unmindful of the basis the government has set out in the course of tracing the income, but the rules are rigid. The best I can do is to pass on the admissibility of the testimony. In this instance, I must rule the evidence is not competent."

Carroll then was excused from the stand. One of the interested spectators in the courtroom during Carroll's appearance on the stand was Oklahoma County Atty. James Harrod, whose office is conducting an investigation of its own.

THE 58-YEAR-OLD CORN, WHO is serving an 18-month prison sentence at the U.S. Medical Center in Springfield, Mo., was brought here as a government witness Friday.

He invoked the Fifth Amendment 17 times in refusing to testify.

Corn was indicted by a federal grand jury in Oklahoma City in April at the same time that Welch was indicted. Corn was sentenced on July 1 by Judge Harper after he pleaded no-contest to his six counts of tax evasion.

After Judge Harper ruled today that Carroll's testimony was not admissible before the jury, the government called Lonnie Williams of Norman, an Internal Revenue Service agent.

Williams described an investigation he made of Welch's accounts. He was the last witness before the noon recess.

OKLAHOMA'S GREATEST NEWSPAPER

TULSA DAILY WORLD

RELIABILITY CHARACTER ENTERPRISE

60th Year—No. 30 | FINAL | TULSA, OKLAHOMA, TUESDAY, OCTOBER 13, 1964 | 30 PAGES—2 PARTS | PRICE FIVE CENTS

—Associated Press WIREPHOTO

Hugh Carroll, right, leaves Muskogee courtroom with IRS Agent Harry Lynch.

Probers Advertise

Wanted: Any Bribery Clue

By Hugh Hall

WANTED—Proof of bribery of any member or former member of the Supreme Court of Oklahoma.

That stark invitation appears in the current issue of the Oklahoma Bar Journal as a plea from a special investigating committee of the bar.

"You are a lawyer," the unconventional investigative approach declared.

"You know the difference between allegation and proof, and the difference between irresponsible charges and evidence.

"If you have, or know anyone who has, any proof or evidence of bribery of any member or former member of the Supreme Court of Oklahoma, please get in touch with the investigating committee of examiners."

Payoff Is Claimed

Below the message appears the names of Garrett Logan of Tulsa, committee chairman, and Hicks Epton of Wewoka and Harold J. Sullivan of Oklahoma City, members.

Only Monday Hugh Carroll, former head of the defunct Selected Investments Corp., swore he paid $150,000 to former Justice N. S. Corn for a favorable tax opinion from the court in 1957. Corn, however, is serving an 18-month sentence for federal income tax evasion.

Carroll quoted Corn as saying part of the money was for "some" of the other members of the court, without naming them.

It was this suspicion cast on other members which led the court last summer to ask the bar association to

Wanted: Any Bribery Clues

(Continued From Page 1)

investigate it, in the hope that the guilty, as well as the innocent, could be pointed out.

Operations Mostly Veiled

The bar's executive council last summer declared those guilty should be vigorously prosecuted, and those "who are innocent of guilt should be promptly absolved of suspicion." It deplored "sweeping and indefinite charges and implications against the dedicated members of the bench and the bar."

Since then the special investigating committee has operated mostly under cover. Its primary aim apparently was evidence which would enable it eventually to say which former or present members of the court, if any were guilty and which were innocent.

The committee's frank appeal for evidence could indicate several things.

It could be nearing the end of its search and making a no-stone-unturned finale. There is reason to believe this is unlikely, however, for the committee was understood to be waiting for federal evidence available after the trial of Justice Earl Welch on income tax evasion charges, now under way in Muskogee.

Hugh Carroll To Be Heard In Welch Trial

By Katherine Hatch

MUSKOGEE — Hugh Carroll will testify for the government Monday as the federal income tax evasion trial of Justice Earl Welch enters its second week.

Carroll, who founded and headed Selected Investments Corp., probably will be the last major witness for the government, other than Internal Revenue Service agents.

Don Hansen, special assistant in the tax division, Attorney General's office, Washington, said Sunday the prosecution probably will complete its case Tuesday.

Top Witness

Then defense attorneys will take over, headed by V. P. Crowe, in presenting to the nine men and three women jurors their case for the 72-year-old state supreme court justice.

Carroll is believed a central figure and one of the main witnesses in the government's case against Welch.

It is believed it was Carroll who was the unnamed person referred to earlier by a government attorney as paying $150,000 to a former high court justice in 1957 in return for a favorable opinion on a Selected tax matter.

Witness 'Unnamed'

Former supernumerary Judge N. S. Corn — who served on the high court from 1934 to 1959 — declined to answer any questions about Carroll or Justice Welch when he appeared Friday for the government. He took the Fifth Amendment 17 times.

U. S. Attorney B. Andrew Potter had told earlier of the unnamed witness who allegedly gave the $150,000 to Corn to be used by himself and others on the supreme court as campaign expenses in 1957.

Corn, indicted on three counts of federal tax evasion and two counts of knowingly filing false returns, is serving an 18-month sentence in the federal prison hospital, Springfield, Mo.

Hopes High

The government thinks it will have better luck with Carroll and that he will answer questions put to him concerning the old Selected Corp., and any financial dealings between himself and the high court.

Justice Welch was indicted April 8 on five counts of wilfully evading taxes from 1957 through 1961 on unreported income those years.

The government has claimed he failed to declare $40,000 to $50,000. Justice Welch reportedly told investigating IRS agents that he saved $53,000 in cash and currency by 1932 and took it with him from Antlers when he went to Oklahoma City after his election to the supreme court in 1933.

After Carroll appears, IRS agents will testify.

Welch Trial Reporting Hit

TULSA (UPI) — A Tulsa lawyer Tuesday night criticized reporters who covered the tax trial of Oklahoma Supreme Court Justice Earl Welch at Muskogee for using in their stories the estimony of Oklahoma City promoter Hugh A. Carroll.

Carroll, testifying under oath, said he paid a $150,000 bribe to a supreme court judge in 1957 in return for a favorable tax ruling on his now-defunct Selected Investments Corp.

'Didn't Exist'

Tulsa attorney Irvine Ungerman said on a panel discussion that the testimony of Carroll should not have been reported in news stories because it was not admitted into evidence at the trial.

Ungerman said the Carroll testimony "didn't exist insofar as the law is concerned."

Welch's defense attorneys attempted to have Carroll's testimony given in chambers, but the presiding U. S. district judge said it should be made in the courtroom and entered into the record of the court reporter. The jury was not present, however when Carroll took the stand.

Not Admissable

Harper ruled Carroll's testimony was not admissible because the prosecution did not connect it to the tax evasion charges against Welch.

Carroll said he paid the bribe to former Justice Nelson S. Corn in two payments. Corn currently is serving an 18-month federal prison term for income tax evasion. He resigned from his position as supernumerary judge to the high court and was disbarred after pleading no defense to six counts in July.

Ungerman, participating in a discussion on "free press-free trial," based his criticism on the fact that the judge did not allow the testimony to be entered into evidence.

Defense Made

In Oklahoma City, Bruce Palmer, chairman of the Freedom of Information Committee of the Oklahoma Professional Chapter of Sigma Delta Chi, national journalistic society, defended the reporting of Carroll's courtroom testimony.

"The news media cannot be expected to exercise censorship on testimony presented in open court that was heard by every person in the courtroom," Palmer declared.

"The testimony was offered by the prosecutor and permitted by the trial judge. The news media could not ignore it simply because it was not given in the presence of the jury."

Oklahoma City Times
10-10-64

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statement	2
Argument	3
Conclusion	10

CITATIONS

Cases:

Dennis v. *United States*, 384 U.S. 855	4
Estes v. *Texas*, 381 U.S. 532	6
Friedberg v. *United States*, 348 U.S. 142	9
Holland v. *United States*, 348 U.S. 121	8, 9
Lenske v. *United States*, C.A. 9, Nos. 19,539 and 20,448, decided Oct. 5, 1966	9
Marshall v. *United States*, 360 U.S. 310	6
Massei v. *United States*, 241 F. 2d 895, affirmed, 355 U.S. 595	8
Rideau v. *Louisiana*, 373 U.S. 723	6
Sheppard v. *Maxwell*, 384 U.S. 333	6
Smith v. *United States*, 348 U.S. 147	9
United States v. *Ford*, 237 F. 2d 57, certiorari granted, 352 U.S., 1000, mooted, 355 U.S. 38	8
United States v. *Gilboy*, 160 F. Supp. 442	3
United States v. *Johnson*, 337 F. 2d 180, affirmed, 383 U.S. 169	3

237-005—66——1

Cases—Continued Page

United States v. *Kahaner*, 203 F. Supp. 78, affirmed, 317 F. 2d 459, certiorari denied *sub nom. Keogh* v. *United States*, 375 U.S. 836 .. 3

United States v. *Wortman*, 26 F.R.D. 183 ... 3

Miscellaneous:

Federal Rules of Criminal Procedure:

Rule 16 ... 3

Rule 26 ... 8

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 529

EARL WELCH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. Rs 1–13)[1] is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on June 22, 1966 (Pet. Rs 1), and a petition for rehearing was denied on August 9, 1966 (Pet. Rs 14). The petition for a writ of certiorari was filed on Sep-

[1] "Rs" refers to the appendix to the petition for a writ of certiorari, and "Ra" refers to the three-volume printed record used in the court of appeals. These are the record reference forms which petitioner has employed. See Pet. 2, n. 1.

tember 7, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court erred in denying petitioner's request for a copy of his grand jury testimony.

2. Whether petitioner was denied a fair trial because of publicity appearing before and during the trial.

3. Whether the trial court erred in admitting evidence of petitioner's purchase of a home in 1953 for a woman who was not his wife.

STATEMENT

After a trial by jury, petitioner, a former Justice of the Supreme Court of Oklahoma, was convicted in the Eastern District of Oklahoma (to which the case had been transferred for trial on petitioner's motion) on five counts charging him with wilfully attempting to evade his income taxes for 1957 through 1961, by filing false and fraudulent income tax returns (Ra 1–4). Petitioner was sentenced to concurrent prison terms of three years and was fined a total of $13,500 (Ra 25, 40–41).

The government proved its case by the net worth method. The government's schedule showed that more than $41,000 of income had been unreported in the years 1957–1961 and that, for these years, approximately $12,800 in income taxes had been evaded (Ra 347–352). Petitioner's defense was that he possessed

a cash hoard of more than $50,000 by the beginning of 1933 (Ra 390–391, 395). Rebutting this defense, the government introduced proof that petitioner's former wife had no knowledge of accumulated funds at that time (Ra 50–51), and that petitioner was continuously in debt, and paying substantial interest, from 1928 through 1951 (Ra 53, 183–194, 201–204; Exs. 68, 88B, 136–139, 226).

ARGUMENT

1. The district court did not err in refusing to direct that a copy of petitioner's grand jury testimony be given to him. Prior to the recent amendment of Rule 16, F.R. Crim. P., it had generally been held that a defendant had no right to production of his own volunteered grand jury testimony. *United States* v. *Johnson,* 337 F. 2d 180, 196–197 (C.A. 4), affirmed on another issue, 383 U.S. 169; *United States* v. *Kahaner,* 203 F. Supp. 78, 85–87 (S.D.N.Y.), affirmed, 317 F. 2d 459 (C.A. 2), certiorari denied *sub nom. Keogh* v. *United States,* 375 U.S. 836; *United States* v. *Wortman,* 26 F.R.D. 183, 206 (E.D. Ill.); *United States* v. *Gilboy,* 160 F. Supp. 442, 462–463 (M.D. Pa.). Amended Rule 16 entitles a defendant, upon demand, "to inspect and copy or photograph any * * * recorded testimony of the defendant before a grand jury." That amendment was adopted in February 1966, more than 16 months after the trial in the present case, and was to become effective in July 1966. It obviously could not have been anticipated by the district court in the present trial. And since the rule is now in effect, the issue pre-

sented by petitioner is of no continuing importance.

Nor does this case involve the question decided in *Dennis* v. *United States*, 384 U.S. 855, where this Court held that the grand jury testimony of certain key government witnesses should have been given to the defense for use in cross-examination. The grand jury testimony being sought here was that of the defendant on trial; the defense plainly could not have used it to test the credibility of any government witness. Consequently, the court of appeals concluded correctly that this case was not covered by this Court's ruling in *Dennis*.[2]

2. There is no substance to petitioner's claim that newspaper articles before and during his trial rendered it unfair (Pet. 19–29). Adequate precautions were taken to insure that petitioner would not be prejudiced by the publicity, and petitioner has presented no showing that the proceedings were actually influenced by the newspaper reports. On petitioner's motion, the case was transferred from Oklahoma City (the Western District of Oklahoma) to Muskogee (in the Eastern District). The prospective jurors were thoroughly examined for bias before petitioner's trial. Each of the 32 persons from whom the jurors

---

[2] It should be noted that petitioner was given pre-trial access to a substantial portion of the government's evidence. More than two months before trial he was given copies of all documents in the government's possession which had been obtained from him or from third parties in the course of the Internal Revenue Service's investigation. Three weeks before trial he was given copies of the other exhibits and schedules which the government proposed to introduce in evidence. See the government's bill of particulars (Ra 10).

and alternates were selected was questioned by petitioner's counsel on *voir dire*. Ten of them indicated they had not read about the case, although two of them said they had heard of it on television. Five others indicated they had read of the case only at the time of the indictment. One prospective juror said that he remembered only the charges involved and another said that all he recalled about the case were headlines at the time of the indictment and an article stating that the trial would be conducted by a St. Louis judge. Each of the 32 prospective jurors stated he had formed no opinion as to petitioner's guilt or innocence and could fairly and impartially try the case. Each said he would base his verdict solely on the evidence as it came from the witnesses on the witness stand and the instructions of the court. None was challenged for cause (Ra 90–154).

At the outset of the trial, the court warned all prospective jurors that they were not to read anything with respect to the case in any publication of any kind, nor were they to listen to anything on radio or television or talk with anyone or let anyone talk to them about the case (Ra 89, 116, 154–155, 510–511). The court gave the jury the same admonition at each noon recess and at the end of each day of the trial (Ra 47–48).

Petitioner did not request that the jury be sequestered. He did not call to the court's attention any news article appearing during the trial and did not ask that the jury be questioned concerning any particular trial publicity. Prejudicial trial publicity

was alleged for the first time in petitioner's motion for new trial (Ra 32–34).

Petitioner's post-trial investigations concerning the effect of publicity upon the jurors (Ra 499–505, 510–511) produced no evidence to support his claim that publicity had prejudiced the jurors against him.[3] In light of all these precautions, and the absence of any proof that publicity affected the fairness of the trial, this case is a far cry from those on which petitioner relies such as *Sheppard* v. *Maxwell*, 384 U.S. 333, *Estes* v. *Texas*, 381 U.S. 532, and *Rideau* v. *Louisiana*, 373 U.S. 723. And since there is no showing whatever that any juror read the newspaper articles published during trial to which petitioner objects, this Court's decision in *Marshall* v. *United States*, 360 U.S. 310, is plainly inapposite.

Since the publicity did not reach or affect the jury, its source is irrelevant. In any event, there is no substance to petitioner's added allegation that government misconduct was responsible for the assertedly

---

[3] The affidavit of alternate juror Crawford, to which petitioner refers, and petitioner's unsupported allegations that newspaper accounts of the trial were displayed prominently in the courthouse and in the hotel where four jurors allegedly stayed (Pet. 12, 24–25), were mentioned for the first time in petitioner's motion for new trial (Ra 34), filed the day before the hearing thereon. The Crawford affidavit (Rs 14–15) did not state that the jurors were exposed to any publicity or that they had prejudged the case. Although petitioner was afforded an evidentiary hearing on his motion for new trial (Ra 499–500), he did not call Crawford as a witness or adduce any testimony in support of his allegations that prejudicial publicity must have been brought to the attention of the jury.

prejudicial newspaper articles (Pet. 20–21). At the public sentencing hearing of another former Justice of the Oklahoma Supreme Court who pleaded *nolo contendere* to tax evasion charges more than three months before petitioner's trial, government counsel reported to the court that the prosecution had been prepared to offer testimony concerning a $150,000 bribe which the defendant in that case had accepted. That information was relevant to the sentencing hearing, and it was appropriate for counsel to report it to the court. The fact that the defendant in that case was a possible witness in petitioner's trial did not disable the government from making the necessary disclosure. Nor was petitioner's trial rendered unfair merely because newspaper reports, in describing the witness when he was called, referred to the tax-evasion charges against that witness and to the alleged bribe offer. Indeed, petitioner's own counsel, in conducting a *voir dire* examination of the prospective jurors, was the one who called to the jurors' attention the fact that "some other justice or member of the [Oklahoma Supreme] court has been found guilty of some reprehensible conduct" (Ra 119; see also Ra 103, 108, 130, 141), and received the jurors' assurances that they would not allow such evidence to affect their judgment of the charges against petitioner.

Nor did the district court err in rejecting petitioner's request that the testimony of the former Oklahoma Supreme Court Justice and the witness who was alleged to have given him the bribe be heard in cham-

bers.[4] Rule 26, F.R. Crim. P., provides that "testimony of witnesses shall be taken orally in open court, unless otherwise provided by an act of Congress or by these rules." The court excused the jury and heard the testimony of the witnesses in open court before ruling on the admissibility of their testimony (Ra 68, 71). This course was proper, and there is no showing whatever that the witnesses' testimony came to the jury's attention as a result of the newspaper reports.

3. Petitioner's final contention (Pet. 30–35) is that the trial court erroneously permitted the government to introduce evidence showing that he spent $7,698.45 for the purchase of a home in 1953. In order to rebut petitioner's defense that he possessed a cash hoard, the government introduced evidence showing that petitioner could not have saved more than $36,750.74 as of January 1, 1933, and that, in any event, he spent $54,272.45 more than his reported income during the years 1933–1955. The amount spent for the house in 1953 was introduced as part of this line of proof, and it was plainly relevant for that purpose (Ex. 224; Ra 323–325, 356–357, 361). Such tracing of a defendant's financial history for

---

[4] The evidence was offered for the purpose of showing a likely source of petitioner's unreported income. See *Holland* v. *United States*, 348 U.S. 121, 137–138; *United States* v. *Ford*, 237 F. 2d 57, 65 (C.A. 2), certiorari granted, 352 U.S. 1000, dismissed on grounds of mootness, 355 U.S. 38; *Massei* v. *United States*, 241 F. 2d 895, 904 (C.A. 1), affirmed on another ground, 355 U.S. 595.

the purpose of establishing an opening net worth figure and rebutting a cash hoard defense has been approved by this Court. *Holland* v. *United States*, *supra*, pp. 133–134; *Friedberg* v. *United States*, 348 U.S. 142; *Smith* v. *United States*, 348 U.S. 147, 157–158. The fact that such proof may collaterally have suggested that petitioner was involved in some personal impropriety did not render the evidence inadmissible.[5]

---

[5] Petitioner's counsel has advised us that he intends to file a motion to supplement his petition, in which it will be contended that insofar as the court of appeals rejected the claim that it was error not to produce for defense inspection the grand jury testimony of a government witness whose grand jury testimony was not recorded (Rs 12), the decision below conflicts with that in *Lenske* v. *United States*, decided by the Court of Appeals for the Ninth Circuit on October 5, 1966 (Nos. 19,539 and 20,448). The *Lenske* decision is inapposite, however, because a majority of the court of appeals determined in that case that "the Government so arranged matters" (slip opinion, p. 14) that stenographic reports of certain grand jury witnesses would be available while such reports would be unavailable as to other witnesses. In the present case there is no basis for ascribing such intentional tactics to the government. In any event, no decision of this Court has ever suggested that the government owes an obligation to a prospective defendant to record stenographically minutes of the testimony of all grand jury witnesses. Petitioner's contention that the government was obliged to produce a transcript which did not exist and that his conviction may be reversed for failure to make such production would impose such a duty.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

MITCHELL ROGOVIN,
Assistant Attorney General.

MEYER ROTHWACKS,
RICHARD B. BUHRMAN,
DONALD A. HANSEN,
Attorneys.

NOVEMBER 1966.

U.S. GOVERNMENT PRINTING OFFICE: 1966

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
NOV 10 1966
JOHN F. DAVIS, CLERK

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1966

No. 529

EARL WELCH,
Petitioner,

VERSUS

UNITED STATES OF AMERICA,
Respondent.

REPLY BRIEF AND REQUEST TO SUPPLEMENT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

V. P. CROWE
PAUL R. McDANIEL
570 First National Building
Oklahoma City, Oklahoma

TOM FINNEY
Idabel, Oklahoma

Counsel for Petitioner

November, 1966

UTTERBACK TYPESETTING CO., 13 SO. WALKER, OKLAHOMA CITY, PH. CE 8-0030

SUBJECT INDEX

	PAGE
Statement	1
Additional Questions Presented	2
Additional Reasons for Granting the Writ	3
Reply to Brief in Opposition	9
Conclusion	11

AUTHORITIES CITED

CASES:

Aetna Cas. & Sur. Co. v. Flowers, 330 U.S. 464 (1947)	9
Holland v. United States, 348 U.S. 121 (1954)	8
Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co., 376 U.S. 315 (1964)	9
Lenske v. United States, — F.2d — (Oct. 5, 1966)	3-4, 6
Meyer v. Cadwalader, 49 Fed. 32, (3rd Cir. 1891)	10

STATUTES:

21 U.S.C. 2106	9

APPENDIX

Appendix A:

Opinion in Lenske v. United States (9th Cir.) ..... i-xix

Appendix B:

Original page 18 from Opinion of Court of Appeals below xx

In the
Supreme Court of the United States
OCTOBER TERM 1966

No. 529

EARL WELCH,
Petitioner,

VERSUS

UNITED STATES OF AMERICA,
Respondent.

REPLY BRIEF AND REQUEST TO SUPPLEMENT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Earl Welch, petitioner, submits herewith his reply to the respondent's brief in opposition to petitioner's petition for a writ of certiorari and a supplemental brief to his petition on file herein, pursuant to Rule 24(d) of the United States Supreme Court.

It is the purpose of this brief to supplement the petition for a writ of certiorari because of a decision by the United States Court of Appeals for the Ninth Circuit in *Lenske* v. *United States*,[1] which raises additional questions and es-

[1] The decision in the *Lenske* case was rendered by the Court of Appeals for the Ninth Circuit on October 5, 1966. That decision is reproduced in full as Appendix A, herein. The decision is not yet reported, but has appeared at CCH 1966 Standard Federal Tax Reports, paragraph 9686.

tablishes additional reasons for the granting of the writ in petitioner's case.[2]

Reply will also be made to certain issues raised in respondent's brief in opposition.

ADDITIONAL QUESTIONS PRESENTED

1. Was petitioner denied a fair trial where the government attorneys, in a net worth income tax evasion prosecution, instructed that the testimony before the grand jury of the special agent in charge of investigating petitioner's case not be transcribed thus depriving petitioner of any remedy affording access to such testimony, although the testimony of other witnesses, included that of petitioner, before the grand jury was transcribed, furnished to and used by government attorneys?

2. Should the judgment of the Court of Appeals be vacated and this cause remanded in order that the Court of Appeals may consider the question of whether petitioner was denied a fair trial by virtue of the government attorney's actions in regard to selectively transcribing the grand jury testimony of witnesses, since petitioner was denied the opportunity to present the issue to the Court of Appeals, the record having been sealed and petitioner not being advised of the facts contained in such record until the Court of Appeals rendered its final revised opinion denying rehearing?

---

[2] Petitioner's attorneys advised the Solicitor General of their intention to raise this issue as soon as the decision in the *Lenske* case came to their attention. The respondent has dealt with the issue in the Brief of Opposition at page 9, note 5.

ADDITIONAL REASONS FOR GRANTING THE WRIT

Petitioner respectfully suggests that the decision by the United States Court of Appeals for the Ninth Circuit in *Lenske* v. *United States,* — F.2d — (Oct. 5, 1966), raises additional reasons for granting a writ of certiorari to the Court of Appeals in the within case. The decision by the court below in the instant case is in conflict with the decision by the Court of Appeals for the Ninth Circuit in the *Lenske* case. The issue involved raises an important question concerning the administration of justice and petitioner's right to a fair trial can only be vindicated by a decision of this Court.

In the *Lenske* case, the Court of Appeals for the Ninth Circuit in a two to one decision, reversed the conviction of the defendant, who was tried for income tax evasion by use of the net worth method. As in this case, the special agent who was in charge of investigating the taxpayer testified at trial, at which time the defendant requested a copy of the witness' testimony before the grand jury. The following statement by the majority of the Court of Appeals for the Ninth Circuit succinctly sets forth the facts and the reasons why the actions by the government attorneys in that case, virtually identical with those taken in petitioner's case, constitute one of the grounds for the reversal of the conviction in the *Lenske* case:

> "One incident of the trial will be commented on because it seems to us to have been particularly offensive. The defendant's counsel, having observed that the prosecuting attorney held paper writings in his hand when he, at the trial, examined witnesses who had

testified before the Grand Jury, correctly surmised that the writings were transcripts of the witnesses' testimony before the Grand Jury. Thereupon the defendant's counsel requested a copy of the Special Agent's testimony before the Grand Jury, for use in cross examining the Special Agent, who was, and was to be, the Government's principal witness. Government counsel said that he had not been present when the Special Agent testified before the Grand Jury; that there was no transcript; that none had been made up; that it was his belief that the Special Agent's remarks were not even transcribed, hence it would be a physical impossibility to supply a transcript. The court directed government counsel to check the record. Later government counsel stated that of 16 Grand Jury witnesses whose testimony was transcribed, 12 had testified at the trial; that the testimony of the Special Agent and the Revenue Agent was not transcribed.

"Whether government counsel meant that no shorthand notes had been made of the Special Agent's Grand Jury testimony, or that such notes were taken and had not been typed up, it is evident that the Government so arranged matters that there would be available transcripts by which neutral witnesses could be held to their Grand Jury testimony and checked if they varied from it, while as to government partisan witnesses, who presented no danger of their being swayed from their recitals, there would be no writing which the taxpayer might use for cross examination. It was a clever scheme, but one-sided and unfair, and in complete violation of the teachings of *Holland* v. *United States, supra.*"[3]

---

[3] Appendix A, page xvii.

In petitioner's case, special agent Kaszubowski testified that he was the chief investigator for the Internal Revenue Service in building its case against the petitioner. Petitioner had requested a copy of the transcript of this witness' grand jury testimony prior to trial and renewed his motion during cross-examination at trial. Ra 4, 264. The trial court overruled both motions. Ra 10, 265. On petitioner's motion, the transcript of the grand jury testimony of the witness Kaszubowski was sealed and made a part of the record on appeal, being marked as Government's Exhibit 223.[4] At no time did government attorneys ever advise attorneys for petitioner that the special agent's testimony before the grand jury had not been transcribed.

Nor did the Court of Appeals below mention the fact that the special agent's testimony had not been transcribed in its original opinion handed down in petitioner's case. Page 18 of the original opinion by the Court of Appeals is reproduced as Appendix B herein, and contains the entire discussion by the Court of Appeals in its original opinion pertaining to this issue.

At the time it denied petitioner's petition for rehearing, the Court of Appeals below substituted a new page 18 in its opinion. Therein the Court stated:

> "Appellant asserts that the trial court erred in refusing to provide him copies of appellant's and the government witness Kaszubowski's testimony before

[4] Government's Exhibit 223 is a part of the record certified to this Court by the Clerk of the Court of Appeals for the Tenth Circuit.

> the grand jury. Judge Welch appeared voluntarily before the grand jury, testified at length, but did not testify in the case at bar. Kaszubowski testified both before the grand jury and in the case. However, this witness' testimony before the grand jury, except for some preliminary questions establishing identification, was not recorded. * * * The witness Kaszubowski's grand jury testimony did not exist in recorded detail except as we have indicated. The trial court did not invade the province of the advocate in refusing to produce it as a tool of defense utility."[5]

It is respectfully submitted that the decision by the Court of Appeals below is in conflict with that rendered by the Court of Appeals for the Ninth Circuit in the *Lenske* case. This is the first opportunity which petitioner has had to raise this issue, since the *Lenske* decision was handed down after the petition for a writ of certiorari was filed herein. Since petitioner had no knowledge of the fact that the witness Kaszubowski's testimony was not recorded until the opinion change was made by the Court of Appeals below in conjunction with denying petitioner's petition for rehearing, petitioner had no opportunity to present the issue to the District Court or the Court of Appeals.

Petitioner's case is virtually identical with that of the defendant in the *Lenske* case. Here, too, the net worth method of prosecution was utilized. Here, too, the government's special witness appeared before the grand jury and testified, but at the government attorney's direction, his

---

[5] Rs 12-13 in the original petition on file herein.

testimony was not recorded.[6] However, the testimony of other witnesses before the grand jury was transcribed and used by the government at petitioner's trial. Indeed, the government was permitted to use the grand jury testimony of Ophia Taylor, petitioner's 80-year-old sister-in-law, against her at the trial with devastating effect, when the trial court gave the government leave to treat her as a hostile witness. Ra 168-170. And, of course, an enormous advantage was gained by government counsel who held petitioner's extensive grand jury testimony, but whose own chief witness could testify without fear of contradiction.

It is respectfully submitted that such actions by the government attorneys are "particularly offensive" and operated to deny petitioner a fair trial. The government attorneys are in complete charge of a grand jury proceeding, being unfettered either by the presence of opposing counsel or even by a trial judge. While there traditionally has been no requirement that the testimony of all the witnesses

---

[6] Petitioner has been advised by a deputy clerk of the Court of Appeals for the Tenth Circuit that, in summary, Government's Exhibit 223 reveals that the special agent gave his name, testified that he had been a special agent for ten years, described his duties as a special agent; that he operated with a revenue agent, whose function it was to prepare the audits, whereas the special agent investigated for fraud; that he investigated Justice Corn for the years 1957 through 1960, and Justice Welch for the years 1957 through 1961; that he began his investigation in September, 1962, and finished in September, 1963. *The government attorney then stated that the government had a summary of the investigation and it was therefore not necessary to make a record of the agent's testimony to preserve it.* The note by the court reporter then reads: "Continued, off the record," followed by a notation that the reporter had left the room. Kaszubowski re-appeared before the grand jury the next day and stated that he had not quite finished his testimony, at which time the court reporter made the following notation: "Go off the record—court reporter left the room."

before a grand jury be transcribed, nevertheless, it is manifestly unfair for the government to be able to have transcribed the testimony of those witnesses which it expects to be able to use against them, but refrain from having transcribed the testimony of its own witnesses, which might be later used by the defendant in cross-examination. In the words of the Court of Appeals for the Ninth Circuit, the device used by the government prosecutors here was a "clever scheme, but one-sided and unfair." Such unfairness, especially in a net worth case, strikes at the heart of the precept laid down by this Court in *Holland* v. *United States*, 348 U.S. 121 (1954), that the strictest care must be exercised to insure the defendant of a fair trial in a net worth prosecution case.

It is respectfully submitted that these two cases will operate to create a direct conflict in the Ninth and Tenth Circuits if permitted to stand. The implicit holding in the Tenth Circuit case is that there is no prejudice in the government's action in transcribing the grand jury testimony of witnesses against whom it can use such a record, but refraining from transcribing the testimony of its own witnesses. On the other hand, such a practice will not now be permitted in the Ninth Circuit.

It is respectfully submitted that the decision in the *Lenske* case, when compared with the decision here below, raises an important issue in the administration of criminal justice which should be resolved by the Court. And, of course, petitioner's right to a fair trial can only be vindicated by the granting of the writ in this case.

In the alternative, petitioner requests that the judgment of the Court of Appeals below be vacated and the case remanded to the Court of Appeals for a consideration by it of this issue. 21 U.S.C. 2106; *Italia Societa per Azioni di Navigazione* v. *Oregon Stevedoring Co.*, 376 U.S. 315 (1964); *Aetna Cas. & Sur. Co.* v. *Flowers*, 330 U.S. 464 (1947). As noted above, petitioner never had an opportunity to present this question to the Court of Appeals since he was not advised either by government attorneys, or by any record in the District Court or in the Court of Appeals, that the government witness' grand jury testimony had not been transcribed, until the denial of his petition for rehearing before the Court of Appeals, at which time it was too late for him to present the issue to the Court of Appeals. It is respectfully submitted that petitioner is entitled to have a review by an appellate court of this question, whether by the granting of the writ by this Court, or by the Court of Appeals on remand.

REPLY TO BRIEF IN OPPOSITION

Brief reply should be made to some of the statements contained in the Brief for the United States in Opposition.

It is asserted at page 6 of the Brief in Opposition that prejudicial publicity was alleged for the first time in petitioner's motion for new trial. This is inaccurate. The problem of prejudicial trial publicity was raised by petitioner in both of his pre-trial motions, the motion for continuance and the motion to hear the testimony of certain witnesses in chambers. Both of these motions were resisted by the government and overruled by the court. Ra

11, 19, 21, 22. Petitioner could do no more to alert the trial court to the problem. *Meyer* v. *Cadwalader*, 49 Fed. 32, 36 (3rd Cir. 1891).

Further, the government's attempt to justify its public statement in Justice Corn's case, as set forth on page 7 of the Brief in Opposition, is incomplete at the decisive point. The government carefully omits the fact that it did not limit its statement of the alleged $150,000 bribe as having been paid to the defendant in the Corn case. The actual statement made was that the bribe was paid to Corn and "others" on the Supreme Court. Rs 23.

The government's phrasing in paragraph 3 of its "Questions Presented," page 2 of Brief in Opposition, begs the actual question raised by petitioner herein. The question is whether there was any evidence which would support the inference that the petitioner expended the funds for the house purchase in question. The evidence on the issue, detailed in the Petition, pp. 30-35, demonstrates that there was in fact no evidence which would support such an inference. Under these circumstances, the admission of the testimony of the three women about petitioner's relationship with a woman not at that time his wife was highly prejudicial and inflammatory, since it was never connected up to the case in chief against petitioner by any competent evidence. It is not denied by petitioner that the government in a net worth case can trace a defendant's financial history. Petitioner's assertion here is that this particular item in that financial history was not established by competent evidence, but was injected solely by innuendo of personal immorality not connected with the crime charged.

CONCLUSION

For the reasons set forth in his petition and in this supplement, it is respectfully submitted that a writ of certionari ought to issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, or in the alternative that the case be remanded to the Court of Appeals for the reasons set forth above.

Respectfully submitted,

V. P. CROWE
PAUL R. MCDANIEL
570 First National Building
Oklahoma City, Oklahoma

TOM FINNEY
Idabel, Oklahoma

Counsel for Petitioner

November, 1966

APPENDIX

APPENDIX A

Reuben G. Lenske, Appellant v. United States of America, Appellee.

U. S. Court of Appeals, 9th Circuit, No. 19,539, and No. 20,448, 10/5/66. Reversing an unreported District Court decision.

R. Lenske, Portland, Ore., pro se. Sidney Levak, United States Attorney, Portland, Ore. Mitchell Rogovin, Tax Division, Department of Justice, Washington, D. C. 20530, for defendant.

Before CHAMBERS, Circuit Judge, MADDEN, Judge of the United States Court of Claims, and HAMLEY, Circuit Judge.

MADDEN, Judge: The appellant Lenske will be referred to hereinafter as the defendant. In a trial without a jury in the district court he was convicted on three counts of evasion of federal income tax and on one count of willfully subscribing to a false income tax return. No. 19539 is his appeal from his conviction. No. 20448 is his appeal from the order of the district court denying his motion for a new trial in the case in which he was convicted, and from the order denying his motion to disqualify the trial judge from sitting, on a remand directed by this court.

The function of a Revenue Agent in the organization of the income tax division of the Bureau of Internal Revenue is to investigate situations in which a taxpayer may not have paid as much income tax as he should have paid. Such an investigation is for the purpose of determining whether there is occasion for the Government to take the steps prescribed by law to assess and collect additional taxes. If it appears that the situation may involve a fraudulent evasion of taxes for which a criminal prosecution

should be brought, a Special Agent is assigned to the case, and he is thereafter in charge of the investigation. In May, 1959, a Special Agent was assigned to the defendant's case. He and the Revenue Agent who was already working on the collection aspects of the case devoted their full time for the following two and one-half years to the investigation of the defendant's case.

On June 13, 1961, the Special Agent made his report to his superior, the District Director of Internal Revenue. The report consisted of 37 closely type-written pages, followed by an appendix of 84 pages which listed 468 exhibits, and the names and addresses of 315 witnesses who would be available to testify for the prosecution if criminal proceedings were initiated. The report recommended criminal prosecution. Near the beginning of the report, under the heading, "History of Taxpayer," after stating, among other things, that Lenske had been born in Russia, reared in Minneapolis, had been a resident of Portland, Oregon, since 1925, had lived in the same house since 1936, and had no known criminal record, the report continued:

> Representatives of the Federal Bureau of Investigation, Portland, and the Intelligence Division of the Portland Police Department stated that they have reason to believe that Mr. Lenske is a communist. In fact, they each maintain an extensive file on Mr. Lenske.

The report then stated that attached to the report were Exhibit 3A, a newspaper clipping stating that Lenske and another lawyer had called a meeting for the purpose of forming a local chapter of the Lawyers' Guild, and Exhibit 3B, which indicated "Mr. Lenske's thinking on the subject of Cuba, Laos, China, etc." We take judicial notice that the Lawyers' Guild is a national organization of left-wing lawyers. We take judicial notice that there is in this country

and in the world a great variety of "thoughts on Cuba, Laos, China, etc."

An examination of the exhibits shows that Exhibit 3A is a short news story saying that another lawyer and Lenske had called a meeting at a hotel for the purpose of organizing a local chapter of the Lawyer's Guild, and that a feature of the meeting would be the showing of a left-wing film "Operation Abolition." Exhibit 3B is a rather long letter to the editor, from Lenske, in which Lenske expresses the thought that in "Cuba, Laos, China, etc." this country's actions had been in violation of our own laws and treaties, and in violation of international law.

We reverse. This court will not place its stamp of approval upon a witch-hunt, a crusade to rid society of unorthodox thinkers and actors by using federal income tax laws and federal courts to put such people in the penitentiary. This court will not be so used.

When the Special Agent's report came in to his superiors, with his naive disclosure at the very beginning of his report that he placed high among the reasons why Lenske should be criminally prosecuted for income tax evasion Lenske's being a left-wing lawyer and having unorthodox political and social ideas, his superiors should have immediately removed him from the case and discarded every judgment which was contained in his recommendation. The Special Agent had given his superiors express notice that he was confused with regard to his duties and with regard to the basic ideals of his government. Discarding two and one-half years of dedicated endeavor of the Special Agent would have been a small price to pay to get the Government and its awesome taxing authority back on the path of fairness and decency.

The judgments which the Special Agent formed and embodied in his recommendation that Lenske be criminally prosecuted can only be described as grotesque. His two and

one-half years of investigation had convinced him that Lenske had evaded taxes in the amount of $11,465.74 for the year 1955. The trial resulted in a finding that Lenske's taxes for 1955 would have been $414.78. The Special Agent determined Lenske's taxes to be 27 times as much as the court found them to be. On an examination testing his accuracy, the Special Agent would have scored less than 4 out of a possible 100. For the year 1957 the Special Agent's report said that Lenske had evaded $19,412.88 in taxes. The judgment of the court was that his taxes were $1006.18. The Special Agent's report thus charged Lenske with nineteen times as much tax as the court found that he owed. The Special Agent's score was less than 6 out of a possible 100. For the year 1958, the report said Lenske should have paid $7,746.85. The court found that his taxes were $4,682.99, but that he had paid $2,000 in estimated tax. That left him owing $2,682.99. The Special Agent testified that he had, in his investigation, conducted perhaps 1500 interviews. He might well have found time to look at the Government's record of Lenske's 1958 payments of $2,000 of estimated tax. The Special Agent's report thus attributed three times as much tax to Lenske as he owed for 1958. This was the Special Agent's best score, some 33 out of a possible 100. For 1956, the Special Agent's report said Lenske should have paid a tax of $5,225.77. The court found that Lenske had no taxable income for 1956, but had a loss of $9,231.59. The Special Agent's examination score for 1956 would be, then, some almost incalculable number below zero.

The Special Agent was, so far as the record shows, technically competent and experienced. Such gross miscalculations as we have recited make it evident that some element, foreign to the functions and duties of a government tax officer, was corroding his judgment. Whether that corrosive element was that he had views differing from

Lenske's about the Lawyers' Guild, or about "Cuba, Laos, China, etc.," or about other policital and social problems, or was something else that we cannot even imagine, the consequence is that we have no confidence whatever in the Special Agent's conclusions in this case. Yet he was not only the Government's investigator but the Government's principal witness in the trial. Under his supervision the complicated charts and computations were prepared. He presented and explained them to the court. He testified that he interviewed more than 500 witnesses, perhaps as many as 1500, and read "thousands, thousands" of documents.

This case was prosecuted and tried by the "net worth" method. In *Holland* v. *United States* [54-2 USTC ¶9714], 348 U. S. 121, 129, the Supreme Court said, of that method of trial:

> Appellate courts should review the cases, bearing constantly in mind the difficulties that arise when circumstantial evidence as to guilt is the chief weapon of a method that is itself only an approximation.

We follow that admonition of the Supreme Court.

In many net worth cases the prosecution proves that the defendant was able to purchase property or make expenditures during the tax year in excess of what he would have been able to do upon the income which he showed on his tax return. He got the money somewhere, and the Government proves a likely source from which it may well have come. If it did come from that source it was taxable, but was not shown on the return. Sometimes the defendant claims that it came from a cash hoard which he had held for many years, or from a gift or a loan from a relative. Sometimes the expenditures are made from cash, difficult to trace to and from the taxpayer.

No such trappings are involved in this case. There was no suggestion of a secret hoard. The money that came in to Lenske went into his bank account. His payments were made by check. He furnished his cancelled checks to the Special Agent, who said in his report that they "were substantially complete for the years 1945 through 1958" and that "For the most part they indicated the purpose for which they were issued." The Special Agent and his assistant were, with the defendant's permission, installed in the small library of the defendant's law office for many weeks or months. The Special Agent called upon the defendant for particular files as they were needed, and the defendant directed his employees to find and turn over the desired files. There was no instance, apparently, in which any paper or record relating to the defendant's innumerable transactions was not delivered to the Special Agent. The Special Agent testified, rather petulantly, that on a few occasions there was some delay in getting the defendant to direct his employees to promptly find and deliver requested papers. The defendant did have a law practice and many business affairs to attend to.

The Special Agent and his assistant spent many hours in the defendant's library hand-copying writings from the defendant's files and records. In these days of photostating machines, that was a very wasteful process. But instead of frankly asking the defendant if they might upon giving him a receipt for the writings, take them out and have them photographed, they concealed the writings in their brief cases when they left for lunch or at the end of the day, had them photographed, and sneaked them back into the defendant's files when they returned after lunch or the next morning.

The trial judge rejected the Special Agent's half-hearted claim that Lenske consented to the carrying out of the papers. The judge said, "It is irregular to have taken

them from the building without advising Mr. Lenske, and the proof is clear that that is what they did." The judge further said that he wanted the pertinent finding to show that Mr. Lenske did not know that the particular document under discussion was given out. We think the evidence shows that the Special Agent's conduct was not only irregular but was furtive and surreptitious, and far beneath the standard of what one expects from a public official. It is interesting that the Special Agent, in his report to his superior recommending that Lenske be criminally prosecuted, said:

> It is concluded that the taxpayer should be prosecuted for attempted income tax evasion for the years 1955 through 1958 and that the evidence is sufficient to secure a conviction. Inasmuch as the taxpayer is a well-known attorney in the Portland area, it is believed that this case would have a definite beneficial effect in this community.

Thus the Special Agent sought to upgrade the moral standards of taxpayers.

This case comes to us on the defendant's appeal from a judgment against him rendered after a second trial. The first trial began in February, 1963, before a judge and jury. After some eight weeks of trial and the hearing of 350 witnesses, the judge, the Honorable John R. Ross, died, and a mistrial was declared. Pursuant to the stipulation of the parties, the judge assigned to re-try the case, sitting without a jury, adopted the record of the proceedings before Judge Ross, but took additional evidence presented by both parties. Since the record made before Judge Ross, consisting of some 40 volumes of reporter's transcript, is a substantial part of the record before us, we make certain observations about the proceedings which produced that important part of the present record.

[APPENDIX]

As we have seen, the evidence relating to some 90 properties, numerous business transactions, of which the record does not indicate the number, and "thousands, thousands" of documents. The indictment stated that the defendant had attempted to evade and defeat his income taxes for the years 1955, 1957 and 1958 in designated large amounts, and that for the year 1956 he made a false return. The indictment gave no information as to which of his 90 properties, his numerous transactions, his thousands of documents, would be involved in the trial of the case. He knew that the Government had copies of all of his records and documents, because he had given them to the Government's agents. He knew that they had been studying them for two and one-half years. But even if he, like them, had had at his disposal all the resources of the United States, its Federal Bureau of Investigation and other investigating agencies, he could not have sought out and interviewed all the potential witnesses to all of his activities, to determine from which direction the attack would come, and then prepare his evidence to meet the attack. It would tax the imagination to conjure up a more frightening and frustrating situation than that in which his government has placed this citizen. The trial judge said to government counsel:

> The Government is the strongest litigant in the world. You have got the F. B. I. and all the government agencies available to you. You represent the strongest client in the world.

Nevertheless, in the first trial, the government counsel staunchly opposed the defendant's motion for a bill of particulars which would have given the defendant some little warning of what he was to be tried for. The court denied the defendant's motion.

Later in the trial, when the defendant sought to obtain copies of papers in the government files which might have been useful to the defense, government counsel said

that he had regularly furnished exhibits to the defendant "the night before" they were used, that he resisted giving out things from government files that the defendant should have no access to, that the defendant had even asked for statements of witnesses who had not testified. It thus seemed outrageous to counsel for "the strongest client in the world" that that client's citizen adversary should have even a moment's notice of what a witness would say to his detriment, or should be armed, as government counsel was armed, with the prior statements of the witness, with which to confront him if he departed from them.

In the Special Agent's two and one-half years of investigation, he had interviewed some 500, perhaps as many as 1500, persons. If any of those persons made statements which would have been helpful to Lenske, the Government's attitude was that Lenske had no right to know that, unless he found it out by his own effort and at his own expense. This attitude and conduct of the Government is in direct contradiction to the teaching of the *Holland* case, 348 U. S. 121. At page 132 the Court said, of the Government:

> . . . its failure to investigate leads furnished by the taxpayer might result in serious injustice.

Again at page 136 the Court said:

> When the Government fails to show an investigation into the validity of such leads, the trial judge may consider them as true and the Government's case insufficient to go to the jury.

The Supreme Court could not have meant that if the Special Agent who follows up the lead simply makes up his mind that the lead produces nothing of advantage to the prosecution, what his investigation discloses becomes a government secret, inaccessible to the defendant, although what

the Special Agent learned by the use of the Government's unlimited machinery of investigation might have been thought significant by a judge or a jury if they had been allowed to learn of it. The Court could not have meant that the Special Agent should be the tribunal empowered to decide criminal tax cases.

Under the *Holland* teaching, a lead not furnished by the defendant but discovered by the Special Agent in his investigation would have at least equal status with a lead furnished by the defendant. The philosophy of *Holland* is that the trial of a tax fraud case by the net worth method places a defendant at a disadvantage dangerous to his liberty, and that some departure from the gamesmanship tactics of ordinary trials, even other criminal trials, is necessary to compensate for the disadvantage and make the contest more nearly equal.

The government investigation and trial of the instant case reflects none of the spirit and philosophy of *Holland*. The defendant's cross examination of the Special Agent developed pertinent information about the Special Agent's long and dedicated investigation. In answer to a question about a $500 item he said, "No, I overlooked that. I just missed it." He listed a check from an insurance company which said, "In full settlement of wind policy," as a fee, and added it to Lenske's taxable income and net worth. With regard to items which he attributed to Lenske personally but which might have belonged to Lenske's law partnership, which made its own tax return, he said, "I don't know if all of the fees got into that partnership, I had no way of determining that." The law library where the Special Agent worked over Lenske's papers for many weeks was the partnership's library, and the Special Agent was never denied any information sought from the partnership or Lenske.

The defendant presented an expert tax witness, Marx, whom the court regarded as an honest and highly competent tax expert. He, as an employee of the Internal Revenue Service, had had charge of supervising and training fourteen agents. After leaving the Internal Revenue Service he had set up an office and acted as a tax expert and witness for taxpayers and for the Government. In his 17 years in and out of the Government he had worked on more than 500 net worth cases. Although Marx had had for only a short time the materials which the Special Agent had worked over for two and one-half years, one significant mistake became apparent to him within the first half hour of his study of the Special Agent's charts and exhibits. His testimony pointed out error after error in the Special Agent's treatment of transactions large and small. Many of his corrections were adopted by the Government when it revised its charts. But of particular significance is Marx's testimony with regard to the Special Agent's failure to follow leads which would have led to the right answers. Several instances were given by Marx. Many of his answers, obtained by following leads, were, as we have seen, accepted by the Government without further controversy. Marx spoke particularly about the Special Agent's failure to use the microfilms, which banks make and retain and which identify the bank on which a deposited check is drawn, to determine whether the deposit represents taxable income, or the repayment of a debt, or a deposit for investment, or the payment of an insurance loss, or whatever else it might represent. Marx testified that in seventeen years of tax practice he had not once been unable to so trace a deposit to its source. The Special Agent appears not to have made use of this important, practicable and reliable follow-up method.

It may be asked what harm is done, after all, by disregarding the admonitions of *Holland, supra,* putting every-

thing into a chart showing increased net worth and having the Special Agent testify that it was prepared under his supervision and is right. There is still opportunity for cross examination and for witnesses for the defense.

What is wrong, in addition to its being contrary to the law laid down by the Supreme Court, is that such a process is outrageously unfair. The Government uses its resources, here for two and one-half years, to build up its case and its charts. It then gets its indictment. The taxpayer still has no notice of wherein he is charged with criminal conduct. At the trial, or shortly before, he begins to learn the enormous amount of detail of the Government's case. If he is financially able, and is lucky, he may acquire a tax expert who, in helping him to cross-examine the Government's Special Agent, and in giving direct testimony for the defense, will largely demolish the Government's case. But, as in the instant case, it may leave a remnant, a vestigium somewhat above the level of *de minimis*, so he may still, as in this case, be headed for the penitentiary.

What has happened to him is that the Government has not assumed the burden of proving, beyond a reasonable doubt, that he is guilty. It has assumed only the burden, with its unlimited resources and time, of preparing a mass of documentary evidence and charts incomprehensive to a layman, all prepared by the Government itself, and saying to the taxpayer, "Your task is to prove that *all* of what is contained in the charts is false, not merely that it is 96% false, but that it is all false. You do not have the time nor the resources that the Government had, but that is your misfortune."

As we have seen, the Government presented its case by the net worth method. By that method, the Government in effect sets the taxpayer's return to one side and constructs a new return for him. It thereby assumes the burden of proving, beyond a reasonable doubt, that the items in its

reconstructed return, so far as they are necessary to show that a tax, or a larger tax, was owed by the taxpayer, are true. In the instant case, for the four years in question, the court found that the defendant was entitled to deductions, from what was otherwise reconstructed as his income, of $85,641.88 for depreciation. Depreciation was thus a large and important item in the reconstruction, particularly in view of the fact that the amounts of taxes found to be owing were so small as to be almost trifling in comparison with the amounts charged in the Special Agent's report and in the Government's indictment. A relatively small variation in the amount of depreciation might have erased any tax liability for one or more or all of the years.

A Mr. Kolberg, the Government's expert appraiser, upon whose testimony the Government's depreciation figures were based, was testifying. The following colloquy took place between the court and government counsel, Mr. Alexander:

> The Court: Did you ever try a condemnation case?
>
> Mr. Alexander: Yes, your honor.
>
> The Court: It is all speculation.
>
> Mr. Alexander: Yes.
>
> The Court: All he [Kolberg] can do is speculate. You are dealing, as I said, in probabilities—these intangibles.
>
> Mr. Alexander: That is correct.

The testimony of the expert Kolberg makes it plain that he did not believe, beyond a reasonable doubt, that his figures were correct. He testified in detail as to the complicated method by which he valued the buildings on Lenske's properties, computed the ratio between land and building

and applied that ratio to the cost of the property. He then made his estimate of the economic life of the building to determine the percentage of depreciation for the taxable year. He then applied that percentage to the figure determined in the second preceding sentence, and the result was the depreciation for the year. If he was aware of prospective zoning or of a trend toward commercial development in the area which would result in the early demolition of the existing building, he would take that into account. If such a prospect was known to the taxpayer but was not known to the Government's expert, it of course received no consideration by him. Kolberg testified that he talked with people in the assessors' offices, real estate brokers, and neighbors in the area of the various properties for additional information as to values.

Of importance is the fact that Kolberg made no pretense that there was some arithmetical number which would be right and any other number, greater or smaller, would be wrong, either with regard to his estimate of the value of the building or of its economic life. As to the economic life, he estimated it in "five year jumps." Lenske had some 90 pieces of property of varying types, ages and conditions. Applying the five year jump to a tenant house that had somewhat more than ten years of life to give it a fifteen year life would reduce the percentage of allowable depreciation by one-third. A five year jump from just over thirty years to thirty-five years would have a much smaller effect on the percentage of depreciation.

The expert Kolberg, being asked as to whether his determinations of the economic life of the defendant's depreciable properties leaned toward the longer side or the shorter side, answered:

> No, they don't lean. In other words, as I acknowledged before, I am sure there is leeway, but there is

> leeway in both directions. I deal in round figures because I think that is the way we generally do things, and when I say 15, it could be 17, it could be 13 and it could possibly be a little bit more or a little bit less than that. But I say that is the point in the middle as I see it.

It will be remembered that the trial judge, in the colloquy hereinbefore quoted, had said of Kolberg's figures for the values of Lenske's buildings and land that they were "all speculation." The determination of how much of a deduction for depreciation Lenske was entitled to was arrived at by multiplying a figure which was "all speculation" by a percentage which, according to Kolberg's testimony quoted above, could vary by several percentage points.

The trial judge was apparently troubled by such a synthetic solution of a vital problem in a criminal case. After stating that Kolberg's approach and judgment impressed the court, and that in his opinion the Government, based on Kolberg's testimony, had given the defendant "a reasonable and liberal allowance for depreciation such that any additional allowance would be unrealistic and excessive," the court said:

> Nevertheless, out of an abundance of caution the Court has adopted the position of further increasing the defendant's allowance for depreciation by reducing the economic life by three years on all properties Kolberg assigned an economic life of five years.

The court assigned no other reason for this action than "abundance of caution." Thus the court, skeptical about the contents of the *pot pourri,* added some seasoning to make it less repulsive.

If this were a condemnation suit in which it was necessary to arrive at *some* figure in order to dispose of the controversy, it would be both proper and necessary to adopt

the estimates of some competent, honest and frank appraiser, such as Kolberg apparently was. It would rarely be necessary, we suppose, for the court, merely out of an abundance of caution, on its own motion, to add to or subtract from such figures, admittedly on a completely irrational basis. But this is a criminal case, and a close one. In all conscience, is it right to send a man to the penitentiary on the basis of a figure arrived at by the multiplication of an "all speculation" figure by another figure the proponent of which says is fifteen but says that if someone else said it should be thirteen or seventeen or possibly a little bit more or a little bit less, he, too, would be right?

The judge related how he had personally bought an old building for an investment, and had to assign some economic life to it on his tax return. He would have known that he couldn't write it off in five years, and that 50 years would have been too long a life. He did not remember what life he assigned to it. He said, "So you try to do the best you can. You come up with some life on it, even though it is an old building."

We are not aware of any precedent for a conviction of tax fraud by the net worth method in which the question of whether any tax was due was a close question and an important factor in the case was the amount of depreciation which the prosecution might properly assign to the defendant on a large number of miscellaneous properties owned by the defendant. We find it hard to imagine a case in which such a conviction would be defensible. In the instant case the Special Agent testified on cross examination that he had never recommended a criminal prosecution on the basis that items of depreciation were fraud items. But this very case is a case in which the crucial question of whether there is any tax due depends importantly on the amount of depreciation allowed.

One incident of the trial will be commented on because it seems to us to have been particularly offensive. The defendant's counsel, having observed that the prosecuting attorney held paper writings in his hand when he, at the trial, examined witnesses who had testified before the Grand Jury, correctly surmised that the writings were transcripts of the witnesses' testimony before the Grand Jury. Thereupon the defendant's counsel requested a copy of the Special Agent's testimony before the Grand Jury, for use in cross examining the Special Agent, who was, and was to be, the Government's principal witness. Government counsel said that he had not been present when the Special Agent testified before the Grand Jury; that there was no transcript; that none had been made up; that it was his belief that the Special Agent's remarks were not even transcribed, hence it would be a physical impossibility to supply a transcript. The court directed government counsel to check the record. Later government counsel stated that of 16 Grand Jury witnesses whose testimony was transcribed, 12 had testified at the trial; that the testimony of the Special Agent and the Revenue Agent was not transcribed.

Whether government counsel meant that no shorthand notes had been made of the Special Agent's Grand Jury testimony, or that such notes were taken and had not been typed up, it is evident that the Government so arranged matters that there would be available transcripts by which neutral witnesses could be held to their Grand Jury testimony and checked if they varied from it, while as to government partisan witnesses, who presented no danger of their being swayed from their recitals, there would be no writing which the taxpayer might use for cross examination. It was a clever scheme, but one-sided and unfair, and in complete violation of the teachings of *Holland* v. *United States, supra.*

The appellant's conviction is reversed and the case is remanded for further proceedings not inconsistent with this opinion.

Our disposition of No. 19,539 renders the appeal in No. 20,448 moot. It is dismissed.

Dissenting Opinion

CHAMBERS, Circuit Judge, dissenting: I would affirm these cases per curiam, but one vote will not do it.

The author of the foregoing opinion seems to be convinced that this is a case of guilt by association. What motivated the prosecution is by no means clear, but the defendant was not convicted on a "guilt by association" basis.

The record could sustain on a preponderance of the evidence basis a far greater deficiency in income than the trial judge found beyond a reasonable doubt. The trial judge gave the defendant every "break" I can imagine. But after doing so, it was abundantly clear to him, as it is to me, that the defendant was guilty.

The matter concerning the special agent's report, we should not use. The report at the threshold of the case was handed to the defendant and to the district judge. The defendant did not even ask to have the report marked for identification. To get it into our record, we had to send out and get it "for identification." To this I agreed, believing this court is entitled to see anything the district court saw. But our order did not adjudge that we were entitled to use anything therein. And, now the majority introduces a new principle of evidence: "Things merely identified, henceforth shall be considered in evidence."

A proper appraisal of the case is this: Defendant is a lawyer. Part of the time he had a lawyer, but it is obvious

he would not let the lawyer handle the case. Guilty as I believe the defendant is, a good lawyer, permitted to manage the case rather than the client running it, might have won the case. The defendant made his own bed and set it on fire. We pull him out of it.

Needless to say, I do not agree with the majority's analysis of how weak the government's case was or that Lenske's conviction departs from the standards of *Holland* v. *United States* [54-2 USTC ¶9714], 348 U.S. 121.

the government was sufficient to warrant conviction even without the proof of the incident complained of, we know of no rule that requires the government to limit its presentation to a minimum case simply to avoid a sensitive area of proof.

Appellant asserts that the trial court erred in refusing to provide him copies of appellant's and the government witness Kaszubowski's testimony before the grand jury. Judge Welch appeared voluntarily before the grand jury, testified at length, but did not testify in the case at bar. No showing of particularized need for either his own testimony nor that of the witness Kaszubowski was made. In such case it is not incumbent upon the trial court to provide access to the grand jury proceedings nor to examine them in camera at the request of the defendant. Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395; United States v. Procter and Gamble Co., 356 U.S. 677; Bary v. United States, 10 Cir., 292 F.2d 53; Travis v. United States, 10 Cir., 269 F.2d 928, rev'd on other grounds, 364 U.S. 631.

Appellant also claims that he was denied a fair trial because a juror, asked upon voir dire if he had had any near relatives who had been involved in litigation that had been reviewed by the Supreme Court of Oklahoma, did not disclose